

SETTLEMENT AGREEMENT BY AND AMONG THE  
UNITED STATES OF AMERICA, THE FEDERAL  
COMMUNICATIONS COMMISSION, NEXTWAVE  
TELECOM, INC., ET AL.

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JOINT HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
COMMERCIAL AND ADMINISTRATIVE LAW  
AND THE  
SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
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**SETTLEMENT AGREEMENT BY AND AMONG  
THE UNITED STATES OF AMERICA, THE  
FEDERAL COMMUNICATIONS COMMISSION,  
NEXTWAVE TELECOM, INC., ET AL.**

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**THURSDAY, DECEMBER 6, 2001**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMERCIAL  
AND ADMINISTRATIVE LAW,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittees met, pursuant to call, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Bob Barr [Chairman of the Subcommittee on Commercial and Administrative Law] presiding.

Mr. BARR. I would like to call this joint hearing of the Subcommittee on Commercial and Administrative Law and the Subcommittee on Courts, the Internet, and Intellectual Property regarding the NextWave settlement convened.

For some 5 years the NextWave Telecom, Inc., and certain of its affiliates have been mired in a contentious dispute with the Federal Communications Commission, the FCC, over the ownership of personal communication services spectrum licenses that NextWave acquired in the 1996 FCC auction. In 1993, the Communications Act of 1934 was amended to permit the FCC to sell licenses and construction permits through a competitive bidding process and allow the successful bidders to pay for their licenses in installments. Pursuant to this authorization, auctions of certain licenses were held in 1996. NextWave successfully bid approximately \$4.7 billion for a block of these licenses. Subsequently, however, the market value of these licenses became depressed in response to various events, which in turn adversely impacted the ability of some licensees to obtain funding for their purchases and operations.

After making an initial payment of \$499 million, NextWave failed to obtain financing for the balance it owed to the Government and filed for bankruptcy relief under chapter 11 of the Bankruptcy Code of 1998. It thereafter made no other payments to the FCC for the licenses. Eventually 20 other licensees also filed for bankruptcy relief under chapter 11.

Extensive litigation over the NextWave licenses dragged on for several years. Ultimately, the FCC canceled the licenses and reaucted them in January of this year, resulting in winning bids totaling \$15.82 billion. However, a subsequent ruling by the U.S.

Court of Appeals for the District of Columbia held the FCC's cancellation of the licenses violated the Bankruptcy Code and was thus null and void.

In an effort to resolve the issues presented by the disputed ownership of these licenses, the FCC, NextWave, and certain other interested parties have entered into a settlement agreement late last month. The agreement provides in essence and in part for the transfer of the licenses by NextWave to the FCC, which in turn will convey them to the successful reauctioned bidders. In exchange for agreeing to transfer the licenses, NextWave will receive a cash payment of \$6.498 billion from the U.S. Government in addition to which the Government will make a cash payment of \$3.052 billion directly to the IRS on behalf of NextWave. As a result of these transactions and certain related payments, the United States will receive \$10.001 billion as net proceeds from the settlement. The settlement, in addition to the terms discussed, is also premised on the enactment of legislation approving the settlement and authorizing the appropriation of \$9.55 billion to implement it.

Proponents of the settlement agreement assert that this legislation is necessary by December 1 of this year. Various issues are presented by the settlement agreement that warrant close scrutiny by the Judiciary Committee and upon which I welcome the testimony we are about to hear today. Provisions regarding expedited judicial review and limitations on jurisdiction of actions taken pursuant to the settlement agreement, for example, require explanation and justification.

In addition, the means by which the legislation proposes to effectuate the settlement agreement may present concerns with respect to the uniformity clause in article I, section 8 of the U.S. Constitution. That clause provides that the Congress has the power to establish uniform laws on the subject of bankruptcies throughout the United States. As the proposed legislation is intended to affect the appellate venue and timing of one specified bankruptcy case, these components of the legislation raise a potential constitutional question that must be addressed.

In addition, the central concern arises out of the billions of dollars passed back and forth by the settlement agreement; namely, is this settlement in the best interest of the American taxpayer? To raise and answer questions such as these on behalf of our constituents and the American people is why we are here in Washington today representing their interests and those of the American people at large.

Former Senator Everett Dirksen once described big-time Washington spending in classic terms as, "a billion here and a billion there, and pretty soon you are talking about real money." Even by Senator Dirksen's mathematics, we are talking about real money here, and we hope and need and better get it right on behalf of the American taxpayers.

I would like now to recognize the distinguished Ranking Member of our Subcommittee on Commercial and Administrative Law, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I thank the Chairman for convening the hearing to evaluate what has been proposed to us. I suppose if I were in law school and writing a law school examina-

tion, this would be a pretty good example of all of the issues that could be raised in the context of litigation. It raises questions about the extent to which we should second-guess litigants in litigation as opposed to allowing the FCC and the parties to litigation to enter into an agreement, but I guess they have invited us to do that when they put some provisions in this agreement that require our scrutiny.

It raises questions about the extent to which bankruptcy courts should have jurisdiction over these issues as opposed to other courts of jurisdiction.

It raises questions about the extent to which a party in bankruptcy can use the bankruptcy process to what some would say substantially benefit themselves financially.

It raises questions about whether we should try to figure out a way to preserve the minority in small business set-asides even in the context of—or maybe I should call it the minority in small business goals, even in the context of a bankruptcy proceeding, because, as I understand this, this whole process started out with a bid that was designed to benefit minorities, women and small businesses which was awarded to NextWave. NextWave then declares bankruptcy, and you end up with all of the bidders in the bankruptcy process or potential buyers of these spectrums not being either minority, women, or small. So you have got a system here that really subverts the original intent of the objective to get minority, small and/or women businesses involved in the communication system.

It also raises the question of whether we should be talking about only the resolution of this dispute, because apparently there is a parallel dispute going on with another bidder that the FCC has right behind this one, which I presume they would want to cover following the same processes, but this legislation doesn't seem to address or give them the authority to do that. So I suppose they will be back next year.

But the primary thing that this thing raises for me is how parties can engage in a process for 3 to 5 years, enter into a settlement, and then expect the wheels of Congress to move in a matter of days, and I am not sure that we are going to have the capacity between now and the end of the year to give this the kind of scrutiny that it needs regardless of whether we incline to approve it or not incline to approve it.

I think the first thing that we have an obligation to do is to understand all of the implications that go with every single one of the issues that I have raised in this litany of law school examination issues that I have put on the table, but also quite possibly a number of issues that I have not raised that, in my 2 or 3 hours of review of this and the review of our staffs, we might not even have anticipated as issues.

I come to this hearing with an open mind, but I would have to say I come with the same trepidations that I normally approached the examinations I took in law school, wondering whether I have a basic understanding of what is before me and wondering even more whether I have a clear understanding or even some inkling of what the implications of that might be for public policy, the law, and the future course of conduct, and while the parties to this liti-

gation may not have any real imperative to evaluate this impact on anything other than themselves, as the Chairman of our Subcommittee has eloquently indicated, our responsibility as Members of Congress and of this Committee go well beyond just the outline of this particular settlement. We have some responsibilities to the public, and the first of those responsibilities is to understand in a methodical, timely way the implications of what it is we are being asked to do and to act responsibly in doing what is in the public interest.

I thank the Chairman for convening the hearing, and I yield back.

Mr. BARR. I thank the gentleman from North Carolina.

I would like to now recognize our distinguished colleague also from the great State of North Carolina and who serves as Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, Mr. Coble for any opening statement he might care to provide.

Mr. COBLE. Thank you, Chairman Barr. I thank you for scheduling and convening this hearing, and I will be brief.

I say to my friend from North Carolina, I am relieved that I am not the law student having to write that exam that you are proposing. I would be ultimately challenged. According to the parties, I am told, Mr. Chairman, implementing the NextWave settlement agreement requires a legislative fix, which, of course, is the subject of the hearing today. It is this proposed legislation that we are here to scrutinize. In particular the Subcommittee on Courts, the Internet, and Intellectual Property on which Mr. Berman and I sat is concerned with these portions of the settlement affecting the procedures and jurisdiction of the Federal courts.

Subparagraph (c) and (d) of the proposed legislation contain provisions for expedited judicial review and limitations on jurisdiction of actions taken pursuant to the settlement agreement. These provisions substantially alter regular court procedures and should be carefully reviewed.

And, Mr. Chairman, you and Mr. Watt have both touched on matters that greatly concern me. I am told that at one point—I am applying 20/20 hindsight now, and oftentimes that is easy to do. I am told that NextWave offered to pay the FCC a substantial amount of money as payment in full for these licenses. Now, for some reason, and maybe it is for a valid reason, this offer was rejected, and I am sure somebody is going to put—or at least I hope you put the oars into those waters and assuage my discomfort, because looking back on it, it appears if that had been accepted, there would have been a heap of money saved.

But I thank you again, Mr. Chairman, for calling this hearing, and I yield back.

Mr. BARR. I thank the distinguished Chairman.

I would like now to call on the gentleman from California, Mr. Berman, the distinguished Ranking Member of the Subcommittee on Courts, the Internet, and Intellectual Property, for any opening statement he might care to make.

Mr. BERMAN. Thank you very much, Mr. Chairman.

Well, I guess our role in some way is limited. I certainly am looking forward to hearing the Government in the form of the Depart-

ment of Justice and the FCC explain why something which seems so incredible on its surface is compelled by the law, by public policy, by the interests of the taxpayers, and why the party that, by bidding for something that it didn't have the money to pay for, ended up utilizing the bankruptcy process and then working out a settlement which provided no relief for the other parties who were injured by NextWave's bidding practices with money that they did not then have, and why the spectrum is then sold with NextWave reaping huge returns to people who don't even meet the category of people who were supposed to be able to get the spectrum which is being sold.

I also just—I do to some extent resent the fact that we are asked in the nature of an arbitrary deadline to pass legislation which raises many, many questions in a very short time frame as a condition of a settlement, which hopefully you will persuade us, in fact, is in the public interest; that this legislation is necessary to make that settlement good. And I would like to have my entire statement put into the record, and I yield back my time.

Mr. BARR. I thank the gentleman from California.

[The information referred to follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA

Chairman Coble and Chairman Barr,

I am particularly pleased that you called this hearing on the NextWave settlement. I understand that there was significant pressure on the Judiciary Committee to abdicate its legislative and oversight responsibilities with regard to the NextWave settlement and the legislation proposed therein. I thank you for resisting that pressure and calling this hearing so that the Judiciary Committee and our Subcommittees may give this issue the scrutiny it deserves.

I do not have an opinion yet on whether the proposed NextWave settlement is a good or bad deal for the public. I look forward to hearing the perspective of our witnesses on the merits of the deal, and have an open mind to be persuaded by them.

I am, however, somewhat displeased about the process through which the settlement was crafted, and at the settlement's dismissive attitude toward Congress' rightful role.

Somewhere along the line, the parties negotiating the settlement decided that legislation would be necessary to effectuate the settlement. I don't know when that decision was made, because neither the FCC nor DOJ was able to provide my staff with a firm answer, but it appears to have been made by early November at the latest.

In any case, the parties decided legislation would be necessary, and began to draft legislation as part of the settlement negotiations. They did not, however, consult with Congress. They did not inform us about the decision to incorporate legislation in the settlement; they did not include us in the drafting of the legislation; and they did not ask us about the prospects for passing such legislation. And they most certainly didn't consult with us when they chose a December 31, 2001 deadline for enactment of the settlement legislation.

On November 29, two weeks after execution of the proposed settlement, the FCC and DOJ finally met with our staffs and sprang on Congress the need for legislation to effectuate the settlement. Of course, whether intentionally or not, this left virtually no possibility that the legislation could be moved through the regular legislative process and still be enacted by December 31, 2001.

Through their actions, the parties have presented Congress with very unattractive options. One option is to pass legislation we did not craft without full and deliberate consideration in a rush to meet an arbitrary deadline. The other option is to stand in the way of a deal that may greatly benefit the public interest. I am not keen on either option, and I resent being put in this position by the parties.

I yield back the balance of my time.

Mr. BARR. In addition to the other Members, all of whom are certainly welcome to make opening statements, the Chair, and I know

I speak for my colleagues, is happy to welcome my colleague from Tennessee, Mr. Bryant, who is here today even though he does not serve on the two Subcommittees which are holding this hearing today. He is a very distinguished Member of the Judiciary Committee, and we are very happy to have the gentleman from Tennessee with us today.

Are there other statements?

The Chairman of the Subcommittee on Immigration, the former Chairman of this Subcommittee, Mr. Gekas.

Mr. GEKAS. Yes. I thank the Chair. I, for one, welcome the fact that the parties have chosen to see eye to eye and have the colloquialism "meeting of the minds" mean something for a change, and to bring the matter before the Congress for a final resolution by way of ratifying an agreement is a good way to do business.

I have noticed over the time that I have served in the Congress that some of the contentious issues that finally were resolved at the witness table just like today had great, wonderful consequences for the American people, the taxpayers and the citizens who benefited or at least were prevented from suffering at the hands of certain kinds of issues. So this is to me a Member's of Congress delight to have the opportunity to scrutinize something that a meeting of the minds has been reached.

When the first item of NextWave came through to us here in the Congress, it was in the context of our movement toward bankruptcy reform and, in my judgment, so muddled, the efforts we were making, because, in effect, the Congress is being asked to make an adjudication. Well, now we are in a different position. We are here to review a set of propositions that have been agreed, and that is a totally different process, and I welcome the opportunity.

I yield back the balance of my nontime.

Mr. BARR. I thank the gentleman.

The gentleman from New York, Mr. Nadler, I believe, wishes to make an opening statement at this time.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, for the two Congresses preceding this one, I was the Ranking Member of the Subcommittee on Commercial and Administrative Law. During that time we were repeatedly told by the FCC that FCC—that FCC licenses are not the property of an estate in bankruptcy, and that the FCC in its exercise of its regulatory jurisdiction is exempt from the automatic stay of the bankruptcy law. To reinforce that position, the FCC on several occasions attempted to get language put into appropriations bills granting an immunity from the automatic stay of the bankruptcy law, which the courts have now made clear does not exist.

Essentially the FCC's position that it is above the bankruptcy law has turned out to be no great surprise and has been without merit. During the last couple of years, a number of Members of this Committee urged for the FCC at the very least not to react to the licenses while its title and right to do so was clouded by litigation over the Commission's tenuous position maintaining its immunity from the bankruptcy laws in court. We said at the time, Members of this Committee, myself included, that if the FCC proceeded with an auction, and if the courts, as was probable—probably to be anticipated, overruled the FCC and stated they were subject to the

automatic stay in bankruptcy, that the Federal Government would then be on the hook for several billion dollars because either they would have to give the licenses back to NextWave and pay a consideration for taking the licenses away from the people it had given it to. Had they waited and not reauctioned them with the court of appeals decision pending, the Federal Government would not now be on the hook for about \$6 billion.

So I hope that in Mr. Rogovin's testimony he will tell us why the FCC chose to take the risk which has now come to fruition to put the Federal Government on the hook for 6 or 7, X billion dollars when the FCC was warned by Members of this Committee against doing so and insisted on doing so, and now we are here for this legislation for this settlement, which may very well and I think probably is the only way to get the Federal Government off the hook with the least liability, albeit 6 billion unnecessary dollars.

So I hope the FCC will explain to us why they chose to put the Government on the hook on the rather arrogant assumption that they would succeed in convincing the courts to abrogate Federal bankruptcy law.

Thank you, Mr. Chairman.

Mr. BARR. I thank the gentleman from New York.

Does the gentleman from Ohio, Mr. Chabot, need time?

The gentleman from Michigan, Mr. Conyers, is recognized for purposes of an opening statement, the distinguished Ranking Member of the full Judiciary Committee.

Mr. CONYERS. Thank you very much, Mr. Chairman. I hope everybody here is testifying in support of the agreement because that gets us to the next issue real fast is that now that we all agree, and a little blame has been retroactively assessed, what do you do now? We are racing toward X number of days left. The agreement expires December 31. A very exciting situation we are in here. So what is the plan? We introduce a bill, it's referred to one or more Committees, hey, that is great. Forget December 31.

Maybe there is a better idea within the testimony that we are about to hear, because I think that is the reason that we are all gathered in the room today. After we have congratulated each other and asked, as the gentleman from New York has, why did it have to happen this way, the question is where do we go outside of exchanging seasons greetings and wishing everybody well in the next session of Congress, which will begin without an agreement. So stay tuned.

Mr. Chairman, I return my time.

Mr. BARR. I thank the distinguished Ranking Member of the full Committee.

Are there other Members of either Subcommittee that wish to make opening statements?

In that case, I would ask unanimous consent that the distinguished gentleman from Tennessee, a Member of the full Judiciary Committee, be recognized for a brief opening statement. Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman, for allowing me to participate in this, and my thanks to all the other Members for this courtesy also. I was not as familiar with this situation as I probably should have been until I read about it a little more last week

and became rather upset initially about it. And as I sit here and have talked to some folks before this and I still have those concerns, I find myself agreeing with my colleagues on the other side of the aisle quite a bit on the timing of this and the necessity of this. But having had some experience, quite a bit of experience, in bankruptcy law before I came to Congress in practicing bankruptcy law among other things, I always had situations where I have been suspect of the debtor filing bankruptcy, and I have seen the system used, but I don't think my feelings have been raised to this level, in the level of \$6 billion, ever.

I am very concerned about how this process has worked out. I don't like this. I am opposed to it, even though the parties all agree, and I have got—I see some good sides to it, that we get some spectrum back in the market, but I am concerned what appears to me to be bad faith on the part of this debtor to come in possibly with no intent to ever pay that debt, to immediately go to court after that and have the asset devalued by the court, and have it crammed down where the Government—they weren't even going to pay what they agreed to pay for it. And they had it reevaluated down to a billion dollars and then come back—it just seems like this system has been worked here, and to end up where the debtor nets over \$6 billion in profit, and there is an extra \$24 million in there, I guess, for expenses and lawyers to pay over this period of time seeking the protection of the automatic stay and the other stays available in the bankruptcy court.

I understand that the Government wants to approve this. I understand the purchasers of the spectrum want it approved. I understand NextWave certainly wants it approved. Quite an investment with the Government they made to put down less than \$500 million and to get back clear net profit \$6 billion plus another \$24 million, but apparently it is legal.

I don't know, but I am glad to have these parties here before us today, and I look forward to perhaps some explanation of this and maybe convincing me that I am wrong in this. But I do feel some obligation on behalf of the taxpayers to look at this a little bit more, and I think maybe—my friend from Michigan mentioned, where do we go from here? Maybe we need to let the courts decide whether there is a legitimate stay here and whether this whole process is proper. And we are very close to getting it to the Supreme Court, as I understand, and maybe that is the route we ought to look at.

But with that I thank these two Subcommittees for being so patient, and I will yield back the balance of my no time, as Mr. Gekas says.

Mr. BARR. We thank the gentleman from Tennessee and again welcome him to today's hearing.

At this time I would like to proceed with a number of very distinguished witnesses. As everybody can tell from the opening statements, this is a very important question with many complexities and a great deal of money at stake, and we hope to learn a great deal not only from the opening statements, but from the answers posed to the distinguished witnesses by the Members of the Subcommittees today that will help both Congress, the Administration, the parties and the American people ensure that this settlement,

as the gentleman from Tennessee said, is not only legal, but good policy and good economic policy as well.

Our first witness is Mr. Jay Bybee, the Assistant Attorney General for the Office of Legal Counsel. Prior to holding this position, Mr. Bybee was a professor at law at the William F. Boyd School of Law at the University of Nevada in Las Vegas. He has also taught law at the Louisiana State School of Law and was associate counsel at the Washington, D.C., offices of Sidley and Austin. Mr. Bybee also served in the Office of Legal Policy and at the Civil Division during the Reagan Administration.

Mr. Bybee is accompanied by Mr. Jody Hunt, counsel for the Deputy Attorney General, who is the lead negotiator for the Department of Justice in crafting the NextWave settlement. I would ask Mr. Hunt at this time to join Mr. Bybee at the witness table to be available for any questions that the Members may have relevant to the Department of Justice participation, and we thank Mr. Hunt and Mr. Bybee for being here today.

Our second witness will be John Rogovin, the Deputy General Counsel for the Federal Communications Commission. Before joining the Commission, Mr. Rogovin was a partner in the Washington, D.C. office of O'Melveny & Myers. From 1993 to 1996, Mr. Rogovin served in the Justice Department as an assistant to the Attorney General and as Deputy Assistant Attorney General in the Civil Division, supervising the Federal programs branch. After receiving his JD from the University of Virginia School of Law in 1987, he clerked for the honorable Lawrence H. Silberman at the U.S. Court of Appeals for the D.C. Circuit. Mr. Rogovin, we certainly welcome you here today.

The third witness will be Mr. Donald Verrilli. Mr. Verrilli is the managing partner of the D.C. office of Jenner & Block and serves as co-chairman of the firm's telecommunications group. He is currently an adjunct professor of constitutional law at Georgetown University and has argued several cases before the U.S. Supreme Court, including *Verizon v. FCC*. Mr. Verrilli is an honors graduate of Yale University and received his law degree from Columbia University, where he served as editor-in-chief for the Columbia Law Review. After law school, Mr. Verrilli clerked for appeals court Judge Scully Wright and Supreme Court Justice William Brennan. Mr. Verrilli, we appreciate your being here today and welcome you.

Our fourth and final witness is Mr. Stephen Roberts, who is co-founder and managing editor of Eldorado Communications. Mr. Roberts held his position when Eldorado participated in the original C and F-block FCC license auctions in 1996. He is also co-founder and principal of Poplar Associates, a wireless telecommunications management group based in Memphis, Tennessee. Mr. Roberts graduated summa cum laude from Mississippi State University and received his JD cum laude from the Harvard Law School. Mr. Roberts, we welcome you and your expertise here today.

I would remind all the witnesses that we will time their opening statements, and while we certainly do recognize some leeway is sometimes necessary, we would appreciate their best efforts to work with us in ensuring they come in within the 5-minute time limitation. After each one of the witnesses in order has presented his opening statement, we will then open the floor for 5 minutes

each for Members of the Subcommittees to pose questions and receive answers. We will certainly leave the record open in this case, and we will make a final announcement to that effect at the conclusion of the hearing, so that any additional materials by either Members of the Subcommittees or Mr. Bryant or the witnesses can be inserted into the official record.

At this time the Chair is happy to recognize Mr. Bybee at the U.S. Department of Justice for an opening statement.

**STATEMENT OF JAY S. BYBEE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, ACCOMPANIED BY JODY HUNT, COUNSEL TO THE DEPUTY ATTORNEY GENERAL**

Mr. BYBEE. Thank you, Chairman Barr and Chairman Coble as well as Members of the Subcommittees, for allowing me to provide a statement concerning the settlement agreement reached by the Government, NextWave, and the Auction 35 participants.

The Government's dispute with NextWave dates back to 1996 and 1997 when the company was the high bidder at auctions held by the—

Mr. BARR. Excuse me. I have been asked by some Members if you could pull the mike a little bit closer and make sure it is on so that we can all hear properly.

Mr. BYBEE. The Government's dispute with NextWave dates back to 1996 and 1997 when the company was the high bidder at auctions held by the Federal Communications Commission for wireless telecommunications licenses. NextWave opted to pay its winning bids totaling \$4.86 billion in installments, but soon sought bankruptcy protection. After two trips to the United States Court of Appeals for the Second Circuit, which ruled for the Government on bankruptcy law issues, the FCC reaucted the disputed spectrum earlier this year in FCC Auction number 35. Winning bids for that spectrum in Auction 35 totaled \$15.85 billion, more than three times the amount that NextWave had agreed to pay 5 years earlier.

NextWave brought an action in the District of Columbia circuit challenging the FCC'S reauction of the spectrum. That court held that section 525 of the Bankruptcy Code precluded the FCC'S automatic cancellation of NextWave's licenses. Although the Government has petitioned the Supreme Court for review of that decision, there can be no assurance that continued litigation will allow the Government to put the spectrum to its most productive use or to recover the \$15.85 billion bid at Auction 35. Moreover, even if the Government were ultimately successful in its pursuit of litigation, victory could come only after years of additional delay.

Extensive and complex negotiations lasting more than 2 months culminated in a settlement agreement signed by the Government, NextWave, and Auction 35 winning bidders representing more than \$15.8 billion in bids. Under the settlement NextWave will surrender the licenses in exchange for a guarantee of payment from the United States. The FCC will then grant licenses to the auction 35 winning bidders, who will pay the full amount of their winning bids, approximately \$15.85 billion.

As the Attorney General explained in his letter to the congressional leadership, the Department has concluded that the settle-

ment is strongly in the public interest. It offers two tangible benefits to the American people. First, it accomplishes by mutual consent what lengthy and contentious litigation has been unable to achieve, the award of the spectrum to telecommunications companies that are more likely to use it promptly and efficiently, thereby making possible the expansion and improvement of widely used wireless telecommunications services. Second, it will bring substantial additional revenues to the United States Treasury. The settlement is designed to bring into the Treasury net payments in excess of \$10 billion, resulting in a net benefit to the budget of approximately \$4 billion.

The settlement is a genuine compromise that recognizes the enormous demand for the spectrum and recovers for the public most of the value the spectrum represents to the winning bidders at Auction 35.

The Attorney General has submitted a draft bill that provides statutory authority to proceed with the settlement. The bill provides the guarantee of payment that is required before NextWave will surrender the licenses. It also specifies that Auction 35 should be implemented with payment terms as modified under the settlement agreement. The bill establishes a limited and expedited structure for judicial review of challenges to the settlement which is designed to ensure that any challenge is resolved by the courts as quickly as possible. Three kinds of challenges are permitted: litigation concerning approval of a settlement under the Bankruptcy Code, constitutional challenges to the FCC'S approval of the settlement, and constitutional challenges to the implementing legislation. To ensure consistency and to promote judicial efficiency, the D.C. Circuit will have exclusive jurisdiction to hear any such challenge.

Because the settlement requires enactment of legislation before it can go forward, the department strongly urges the Committee and the Congress as a whole, to take the steps necessary to realize these benefits. Only if Congress enacts the implementing legislation and keeps the settlement agreement in place, will the American people be able to realize in the foreseeable future both the improvement in wireless telecommunications services and the addition of several billion dollars to the Treasury.

I am here today with Jody Hunt, counsel to the Deputy Attorney General, who participated in the lengthy and arduous negotiation process on behalf of the United States. Mr. Chairman, I appreciate your allowing Mr. Hunt to join us here at the table. Mr. Hunt also worked closely with John Rogovin, the Deputy General Counsel for the FCC, who has been called to testify today. I will defer to these gentlemen on questions that implicate the details of the agreement and the relationship between the proposed legislation and the existing law. I would be pleased to respond to any questions concerning the constitutionality of the settlement and the proposed legislation.

Chairman Barr and Chairman Coble, that concludes my prepared statement. I appreciate this opportunity to present the Department's views on this important issue.

Mr. BARR. Thank you Mr. Bybee.

[The prepared statement of Mr. Bybee follows:]

## PREPARED STATEMENT OF JAY S. BYBEE

Thank you Chairman Barr and Chairman Coble, as well as the Members of the subcommittees, for allowing me to provide a statement concerning the settlement agreement reached by the government, NextWave, and the Auction 35 participants. That agreement offers an opportunity for the government to end years of hard-fought litigation on terms that will benefit the American public by providing for prompt deployment of valuable telecommunications spectrum and adding billions of dollars to the United States Treasury.

The government's dispute with NextWave dates back to 1996 and 1997, when the company was the high bidder at auctions held by the Federal Communications Commission (FCC) for wireless telecommunications licenses. NextWave opted to pay its winning bids, totaling \$4.86 billion, in installments, but soon sought bankruptcy protection. The United States Court of Appeals for the Second Circuit agreed with the government that NextWave could not keep the licenses while paying less than the winning bid amount, and also held that the bankruptcy court could not thwart the operation of the FCC's automatic-cancellation rule, under which the licenses dissolved upon failure to make timely payments. Following the Second Circuit's rulings, the FCC re-auctioned the disputed spectrum earlier this year in FCC Auction No. 35. Winning bids for that spectrum in Auction 35 totaled \$15.85 billion, more than three times the amount that NextWave had agreed to pay five years earlier.

NextWave brought an action in the District of Columbia Circuit challenging the FCC's automatic cancellation of the licenses and re-auction of the spectrum. That court held that section 525 of the Bankruptcy Code precluded the FCC's automatic cancellation of NextWave's licenses. The government has petitioned the Supreme Court for further review of that decision. Even if the Supreme Court grants review and rules for the government, there remain other issues to be litigated before the D.C. Circuit and the FCC on remand. Thus, there is no assurance that continued litigation would allow the government to put the spectrum to its most productive use or to recover the \$15.85 billion bid at Auction 35. Moreover, even if the government were ultimately successful in its pursuit of this litigation, success would likely come after years of additional delay in deployment of the spectrum in the face of continuing increases in consumer demand for wireless telecommunications services.

Recognizing these disadvantages of continued litigation, the government entered into settlement discussions with NextWave and the Auction 35 winning bidders. The government pursued settlement as an opportunity to provide for the prompt transfer of valuable, unused spectrum to the Auction 35 Winning Bidders, whose bids provided strong evidence of their ability to put it to the highest and best use, and to increase the amount of money flowing into the Treasury by several billion dollars over what the government might otherwise receive.

Extensive and complex negotiations, lasting more than two months, culminated in a settlement agreement signed by the government, NextWave and Auction 35 winning bidders representing more than \$15.8 billion in bids. Under the settlement, NextWave will surrender the licenses in exchange for a guarantee of payment from the United States. The FCC will then grant licenses to the Auction 35 winning bidders, who will pay the full amount of their winning bids—approximately \$15.85 billion. In exchange for NextWave's relinquishment of its claims to the licenses, and after payment of taxes and other amounts to the government required by the settlement, NextWave will receive approximately \$5.82 billion (net of corporate taxes on the transaction).

As the Attorney General explained in his letter submitting the draft bill to the Congressional leadership, the Department has concluded that "the settlement is strongly in the public interest." It offers two tangible benefits to the American people. First, it accomplishes by consensual arrangement what lengthy and contentious litigation has been unable to achieve—the award of spectrum to telecommunications companies that are most likely to use it promptly and efficiently, thereby making possible the expansion and improvement of widely used wireless telecommunications services.

Second, it will bring substantial additional revenues to the United States Treasury. The settlement is designed to bring into the Treasury net payments in excess of \$10 billion, after accounting for the payment to NextWave. The Office of Management and Budget advises that these payments will result in a net benefit to the budget (above the current baseline) of approximately \$4 billion. The public is far better off with such an agreed resolution than it would be if we continued to pursue judicial relief, especially given the the uncertain prospects of success and the delay associated even with a favorable outcome. The settlement is a genuine compromise that recognizes the enormous demand for this spectrum and recovers for the public most of the value the spectrum represents to the winning bidders at Auction 35.

The settlement requires implementing legislation before it can go forward. The Attorney General has submitted a draft bill that provides statutory authority to proceed with the settlement. The bill provides the guarantee of payment that is required before NextWave will surrender the licenses. It also specifies that Auction 35 should be implemented, with payment terms as modified under the settlement agreement. The bill also establishes a limited and expedited structure for judicial review of challenges to the settlement.

The judicial review provisions of the bill are designed to ensure that any challenge to the settlement is presented to and resolved by the courts as quickly as possible. Three kinds of challenges are permitted—litigation concerning approval of the settlement under the Bankruptcy Code, constitutional challenges to the FCC’s approval of the settlement, and constitutional challenges to the implementing legislation. To ensure consistency and to promote judicial efficiency, the D.C. Circuit will have exclusive jurisdiction to hear any such challenge. Although the bill requires expedited treatment, it leaves the court to set its own schedule, subject to an instruction that the court act “with a view to” deciding the case within a certain period of time “if practicable.” Similar provisions seeking quick action are also provided for rehearing and certiorari review.

The bill provides ample opportunity for judicial resolution of genuine legal disputes about the settlement. As in any bankruptcy case, settlement must be approved by a bankruptcy court or district court. NextWave has filed its motion for approval with the Bankruptcy Court for the Southern District of New York, and the bankruptcy rules provide for a period of notice during which any objections may be brought before the court. If the bankruptcy court grants NextWave’s motion for approval, any objecting party may appeal that decision. The D.C. Circuit, which is familiar with the case, will have exclusive jurisdiction to hear any challenge to the constitutionality of the settlement or the legislation.

The bill precludes nonconstitutional challenges to the FCC’s implementation of Auction 35 pursuant to the terms of the settlement and the legislation. Congress’s express approval of the settlement would eliminate potentially time-consuming litigation. Similarly, because of the importance of putting this valuable spectrum to use as quickly as possible, the bill precludes courts from entering an interlocutory order enjoining an Auction 35 licensee from using the spectrum before the expedited review process has reached finality. Legal disputes that would not affect the implementation of the settlement—such as questions about the qualifications of a winning bidder—are not subject to the provisions for expedited treatment and can proceed in the normal course. The judicial review provisions of the bill permit bankruptcy challenges that are otherwise authorized under current law.

We believe that the bill is constitutional in all its particulars, and that there are no other judicial obstacles to full implementation of the settlement. The settlement nevertheless addresses the consequences of an adverse ruling. If a final court order prevents NextWave from surrendering the licenses, the settlement will not go forward. If a final order bars the FCC from implementing Auction 35, the government will again hold valuable wireless spectrum and could offer it in a future auction as appropriate.

I want to emphasize that the Department of Justice, after careful consideration, has concluded that this settlement of the NextWave litigation offers significant benefits to the American public. Because the settlement requires enactment of legislation before it can go forward, the Department strongly urges the Committee, and the Congress as a whole, to take the steps necessary to realize these benefits. If the implementing legislation is not enacted, we will return to litigation in which our prospects are uncertain and the path to success a long and costly one. Only if Congress enacts the implementing legislation and keeps this settlement agreement in place will the American people be able to realize in the foreseeable future both the improvements in wireless telecommunications services and the addition of several billion dollars to the Treasury.

I am here today with Jody Hunt, Counsel to the Deputy Attorney General, who participated in the lengthy and arduous negotiation process on behalf of the United States. Mr. Hunt worked closely with John Rogovin, Deputy General Counsel for the FCC, who has also been called to testify today. I will defer to these gentlemen on questions that implicate the details of the agreement and the relationship between the proposed legislation and existing law. I would be pleased to respond to any questions concerning the constitutionality of the settlement and the proposed legislation.

Chairman Barr and Chairman Coble, that concludes my prepared statement. I appreciate this opportunity to present the Department’s views on this important issue.

Mr. BARR. Mr. Rogovin, we once again appreciate your being here today, and we recognize you for an opening statement.

**STATEMENT OF JOHN A. ROGOVIN, DEPUTY GENERAL  
COUNSEL, FEDERAL COMMUNICATIONS COMMISSION**

Mr. ROGOVIN. Thank you, Chairman Barr, and good morning, Chairman Barr and Chairman Coble and Members of the Subcommittee. My name is John Rogovin, and I am Deputy General Counsel of the Federal Communications Commission, and I am pleased to be here with you here today.

After months of hard fought negotiations, I am pleased to report that the parties to the *NextWave* case have reached an agreement that will conclude their long-running dispute. The agreement will bring substantial benefits to the American public. Of principal concern to the Commission is that the settlement will allow the immediate deployment of critical spectrum resources that have gone unused during 5 years of delay and litigation. Consumers throughout the United States will benefit from that outcome. In addition, the settlement will generate \$10 billion for the Treasury, nearly twice the amount that NextWave would have paid if it kept the licenses.

The settlement, however, cannot be implemented without legislation. This legislation is needed to permit the Commission to make payments to NextWave and to take other actions to effect the settlement. Because the settlement would bring the NextWave litigation to an end while ensuring substantial benefits for the public, we respectfully urge the Congress to approve the settlement by enacting the proposed legislation.

There are several reasons why this legislation is necessary. First, the proposed legislation ensures that Congress has approved and authorized the settlement in all respects. This congressional action is required to ensure that the Commission is acting fully within its authority. It provides, for example, necessary budgetary and appropriations authority to the Commission to make payments to NextWave.

Second, the proposed legislation contains a judicial review provision, as Mr. Bybee has explained, that provides for expedited review limited to constitutional claims. This provides assurance that the American public will receive the benefits of the settlement with a minimum of additional litigation delay.

Third, the legislation provides the guarantee necessary for NextWave to relinquish its claims on the licenses.

And finally, we are mindful that we have asked much of Congress to pass legislation codifying the settlement by the end of the year. We recognize that the compressed time period for analysis and reasoned discussion makes this task difficult for you and your staffs, and we appreciate the attention and care that has already been shown by Congress in considering the settlement and legislation. As you may know, the final settlement agreement was completed and signed by the Government only on November 26 after a lengthy and complex negotiation period.

We recommend the settlement because it eliminates the uncertainty of continued litigation. While the outcome of this litigation is unknown, it is clear that more litigation will likely mean years of further delay in the ability of the Commission to grant spectrum licenses for much-needed wireless services for American consumers. The Commission first auctioned the spectrum in 1996 and 1997; yet it has never been used. Without a settlement, valuable spec-

trum may well remain fallow at a time when our economy and consumers need it most.

The Commission and other parties to the *NextWave* case have worked long and hard at the negotiating table to resolve a matter of critical importance to the American public. We have attempted to settle this matter in a way that protects the public interests, ensures that the spectrum is put to prompt use, and guarantees that the American people receive fair value for the spectrum.

I would like to thank the Subcommittee for this opportunity to provide information on the *NextWave* settlement, and I look forward to answering any questions you may have.

Thank you, Mr. Chairman.

Mr. BARR. Thank you, Mr. Rogovin.

[The prepared statement of Mr. Rogovin follows:]

#### PREPARED STATEMENT OF JOHN A. ROGOVIN

##### I. INTRODUCTION

Good morning Mr. Chairman and Members of the Subcommittee. My name is John Rogovin, and I am Deputy General Counsel of the Federal Communications Commission.

I appreciate this opportunity to appear before you today to report on the details of the Commission's efforts to reach a settlement in the *NextWave* matter. Last summer, Chairman Powell asked me to explore settlement of the *NextWave* case. After months of hard-fought, around-the-clock negotiations, I am pleased to report that the parties have reached an agreement that will conclude their long-running dispute.

The agreement will bring substantial benefits to the American public. Of principal concern to the Commission is that the settlement will allow the immediate deployment of critical spectrum resources that have remain unused during five years of delay and litigation. Consumers throughout the United States will benefit from that outcome. In addition, the settlement will generate \$10 billion for the Treasury, nearly twice the amount that *NextWave* would pay if it keeps the licenses.

The settlement, however, cannot be implemented without legislation. This legislation is needed to permit the Commission to make payments to *NextWave* and to take other actions to effect the settlement. Because the settlement would bring the *NextWave* litigation to an end while ensuring substantial benefits for the public, we respectfully urge the Congress to approve the settlement by enacting the proposed legislation before Congress adjourns this year.

##### II. BACKGROUND

In 1993, Congress authorized the FCC to award licenses for spectrum through a system of "competitive bidding," or auction. In 1996 and 1997, the Commission held initial auctions for C-Block and F-Block personal communications services (PCS) licenses. At those auctions, *NextWave* submitted the winning bid on 63 C-Block licenses and 27 F-Block licenses, for a total of \$4.8 billion. *NextWave* deposited a \$500 million downpayment with the U.S. Government and agreed to pay the balance (\$4.3 billion) over ten years at a favorable interest rate.

Each license granted to *NextWave* by the Commission was conditioned on *NextWave's* full and timely payment of all its installments, and the licenses made clear that failure to make such payment caused their automatic cancellation. *NextWave* failed to pay its bid commitments, instead filing for bankruptcy protection in 1998. *NextWave* filed to reduce the value of its bids and later fought against license cancellation during the course of its reorganization under Chapter 11 of the Bankruptcy Code.

Over the next three years, the Commission, the United States, *NextWave*, and others engaged in intensely fought litigation in numerous courts, including the U.S. Bankruptcy Court, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the D.C. Circuit, and the Supreme Court of the United States. The Second Circuit upheld the Commission's regulatory requirement that there be full and timely payment by *NextWave* for the licenses. The Second Circuit also held that the Commission's decision to automatically cancel the *NextWave* licenses and to re-auction them was not contrary to bankruptcy law. In January 2001, the Commission

re-auctioned the spectrum previously licensed to NextWave. In that re-auction (Auction No. 35), 21 wireless carriers bid \$15.85 billion for the new licenses.

Meanwhile, NextWave had petitioned the D.C. Circuit for review of the Commission's decision to cancel NextWave's licenses for failure to pay. On June 22, 2001, the D.C. Circuit ruled that the automatic cancellation of NextWave's licenses violated Section 525 of the Bankruptcy Code. The Government has sought review of the D.C. Circuit's decision in the Supreme Court. This matter is still pending.

I recognize that many of you have a long-standing interest in this matter, and some of you even joined an Amicus Brief in support of NextWave during the D.C. Circuit stage of this litigation. While we may disagree on the legal merits of the bankruptcy law question that was before the D.C. Circuit, I believe we can agree that a speedy resolution to this protracted litigation would benefit all of the parties involved, as well as the general public interest.

It is this attempt at a resolution that brings me here before you today. All of the parties to this matter, including NextWave, the Commission, the United States, and the majority of the winning bidders in Auction 35 are seeking your assistance in finally putting this matter to a just end. Specifically, we respectfully request that Congress pass legislation approving and authorizing the settlement agreement. Let me briefly describe below the settlement and why it is in the public interest. I will then address the need for the proposed legislation.

### III. THE SETTLEMENT AGREEMENT AND LEGISLATIVE PROPOSAL

The settlement agreement requires that Auction 35 bidders pay the government \$15.8 billion that they bid in exchange for receiving the licenses auctioned in Auction 35. The government will then keep \$10 billion in net proceeds and will guarantee by December 31, 2002 to pay \$5.8 billion net to NextWave in exchange for its complete release of all claims to the disputed licenses.

The principal benefit of the settlement is that it allows the Commission to grant licenses to companies that will rapidly use them to provide wireless telecommunications services. This fulfills the congressional mandate in the Communications Act to deploy spectrum as expeditiously as possible, without undue regulatory or judicial delay. Moreover, it allows the Commission to grant licenses to the very bidders who place the highest value on those licenses. In the absence of a settlement, there is considerable uncertainty about when the spectrum will be put to productive use in the service of the American public.

Congress also has charged the Commission with obtaining value for public use of the spectrum through the auction program. This settlement will do just that. The settlement will provide payments to the United States of more than \$10 billion—approximately twice what the Treasury would have received had NextWave retained the licenses and more than the government is likely to collect.

The settlement agreement is contingent upon the passage of legislation, and it includes draft legislation for Congress to consider. There are several reasons why this legislation is necessary to effect the settlement.

First, the proposed legislation ensures that Congress has approved and authorized the settlement in all respects. This congressional action is required to ensure that the Commission is acting fully within its authority. It provides, for example, necessary budgetary and appropriations authority to the Commission to make payments to NextWave.

Second, the proposed legislation contains a judicial review provision, patterned on other Acts of Congress, that provides for expedited review, limited to constitutional claims. Any challenge to the legislation, the settlement agreement itself, or to actions taken by the Commission would be funneled into one court of appeals (the D.C. Circuit) and would be on a fast track for review. This provides assurance that the American public will receive the benefits of the settlement with a minimum of additional litigation delay.

Third, the legislation provides the guarantee necessary for NextWave to relinquish its claims on the licenses. In return, NextWave will be paid once the Government receives Auction 35 receipts equal to the payments to be made to NextWave but no later than December 31, 2002.

Finally, we are mindful that we have asked much of Congress—to pass legislation codifying the settlement by the end of the year. We recognize that the compressed period for analysis and reasoned discussion makes this task difficult for you and your staffs, and we appreciate the attention and care that has already been shown by Congress in considering the settlement and legislation. As you may know, the final settlement agreement was completed and signed by the Government only on November 26, 2001, after a lengthy and complex negotiation period.

## IV. ALTERNATIVES TO SETTLEMENT

The main reason to settle is that settlement is preferable to the alternatives. If the Commission continues to litigate and the Supreme Court declines to take the case, the decision of the D.C. Circuit will stand and NextWave will be the licensee. In that scenario, NextWave likely would elect to continue to pay for the spectrum over time at advantageous interest rates. Pursuant to the installment payment program, NextWave could pay for the spectrum over six years at a rate of 6.5% for C-Block licenses and 6.25% for the F-Block licenses. That would leave the Treasury with substantially less than the \$10 billion in revenues that would be generated by the settlement.

Even if the Supreme Court grants the Government's petition for certiorari, the Court might not rule in the Government's favor on the merits. In addition, even if the Supreme Court rules in favor of the Government, it might remand the matter to the D.C. Circuit for further action on several legal issues left unresolved in the panel's initial decision—any of which could result in NextWave remaining the licensee.

No matter what the outcome, litigation would likely mean years of further delay in the ability of the Commission to grant spectrum licenses for much-needed wireless services for American consumers. The Commission first auctioned this spectrum in 1996 and 1997, yet the spectrum has never been used. Without a settlement, valuable spectrum may well remain fallow at a time when our economy and the consumer need it most.

Moreover, even if the Government ultimately prevailed in all litigation, there is uncertainty about the future value bidders would place on the spectrum given fluctuations in the marketplace. Several high bidders in Auction 35 have indicated that if the settlement does not go forward and there is further litigation, they should be released from the obligations of Auction 35. They would argue, for example, that they should be entitled to the return of the \$3.2 billion in deposits held in non-interest-bearing accounts by the Government. It is uncertain at what price the spectrum would sell for at the conclusion of that litigation.

## V. CONCLUSION

The Commission and the other parties to the NextWave case have worked long and hard at the negotiating table to resolve a matter of critical importance to the American public. We have attempted to settle this matter in a way that protects the public interest, ensures that the spectrum is put to prompt use, and guarantees that the American people receive fair value for the spectrum. I would like to thank the Subcommittee for this opportunity to provide information on the NextWave settlement. I look forward to answering any questions you may have.

Mr. BARR. Mr. Verrilli, you are recognized for an opening statement, please.

**STATEMENT OF DONALD VERRILLI, GENERAL PARTNER,  
JENNER & BLOCK**

Mr. VERRILLI. Thank you, Mr. Chairman and Members of the Subcommittees. My law firm, Jenner & Block, represented NextWave before the courts and the FCC in its efforts to retain the spectrum licenses the FCC awarded it in 1997. I also served as NextWave's principal outside counsel in negotiating the settlement agreement that is the subject of this morning's hearing.

I would like to begin by thanking the Subcommittee for the oversight it has devoted to the constitutional and Bankruptcy Code issues in the NextWave controversy. The Committee as a whole and many of its Members individually have worked hard to ensure that the law was applied fairly in NextWave's reorganization proceeding. For example, in April of 2000, the Commercial and Administrative Law Subcommittee held a hearing on the contention of the FCC that it was exempt from certain provisions of the Bankruptcy Code. Similarly, several Members of the Subcommittee found an amicus brief in the D.C. Circuit on behalf of NextWave, and for those efforts the company is extremely grateful.

As the Committee knows and will hear in detail this morning, there is a proposed settlement of the legal controversy that has clouded NextWave's bankruptcy reorganization. To appreciate the fairness of this settlement, it is important to understand what has happened to NextWave over the past 6 years. NextWave was formed in 1995 by a group of experienced telecommunications executives to participate as a designated entity in the auctions and implement an innovative business plan as a nationwide carrier's carrier to provide wholesale wireless service.

At the conclusion of the C-block auctions, NextWave was the high bidder for 63 licenses and made a timely down payment of \$474 million for those licenses. In its initial month NextWave made great progress. It raised more than \$600 million to finance its down payments and begin building its network. By early 1997, NextWave had hired 600 employees and contractors and had 22 offices around the country. It had \$2 billion in financing commitments from major vendors, 90 percent of the microwave links it needed, had 7 switch sites and 1,300 cell sites and 300 site leases.

But the decline in Spectrum value during 1997 caused, in our view, by the FCC's decision to make extra spectrum available resulted in NextWave's financing sources being dried up, but the company did not seek bankruptcy initially, not at all. The company spent more than a year trying to stave off bankruptcy and staying alive, but it was forced to curtail operations dramatically, and it ran up more than \$400 million in debt to creditors, and eventually its fiduciary obligations required it to seek bankruptcy.

The long litigation saga soon ensued, and these Subcommittees are familiar with it. The essence of it is that NextWave sought to defer its payment obligations, including to the FCC, in bankruptcy until it had successfully reorganized. After much litigation in bankruptcy court, and despite the FCC's assurances that NextWave's licenses would not cancel if it deferred payment, the FCC announced in January 2000 that it would cancel the licenses. NextWave fought that effort in bankruptcy court, but the second circuit said that the D.C. Circuit had jurisdiction to review the FCC's actions.

NextWave went to the D.C. Circuit, and the D.C. Circuit held that section 525 of the Bankruptcy Code prevented those licenses' cancellations. Upon receiving that ruling, NextWave once again promptly sought to implement a plan of reorganization and get up and going as a business.

All of that brings us to where we are today, to the settlement. It is a compromise, and a very fair one, and its benefits are clear, but each of the parties is also giving up something important, and I think it is important for these Subcommittees to understand what NextWave is giving up. The first is lost opportunity that we have already experienced. In January of 2000, NextWave proposed a plan of reorganization to the bankruptcy court that would have paid the FCC in full in advance for its licenses. The FCC rejected that proposal and cancelled the licenses instead. The D.C. Circuit then said that was unlawful.

Had the FCC not done so and we had emerged from bankruptcy, we would have been up and running for 2 years now. We would be a viable nationwide wireless carrier, and by way of comparison, another wireless carrier, VoiceStream, which has a national footprint

comparable to the NextWave licenses, was sold for approximately \$29 billion after a little over 2 years of operation. That is lost opportunity already.

The spectrum, if NextWave were to retain it through this litigation, would require NextWave to pay to the FCC approximately \$5 billion, but the market has evaluated that spectrum at \$16 billion approximately now through the reauction process. So NextWave is giving up a great deal there as well.

But there is also lost future opportunity. NextWave, if it keeps these licenses, will reorganize and will be a viable nationwide carrier with great value, but we are giving that up in this settlement, so this is a fair settlement.

Mr. Chairman, I welcome the opportunity to answer any questions that Members of the Subcommittees may have about the settlement. Thank you.

Mr. BARR. Thank you, Mr. Verrilli.

[The prepared statement of Mr. Verrilli follows:]

#### PREPARED STATEMENT OF DONALD VERRILLI

##### INTRODUCTION

Thank you, Mr. Chairman; Members of the Committee. My name is Donald Verrilli and I am a partner in the law firm of Jenner & Block. For the past two years my firm has played a significant role in representing NextWave Telecom Inc. ("NextWave") before the courts and the FCC regarding the company's efforts to retain, pay for, and build out spectrum licenses that were initially awarded to NextWave by that agency in 1997. For example, we represented NextWave in connection with all aspects of the D.C. Circuit litigation. We handled the effort to convince the D.C. Circuit to stay the reauction of NextWave's licenses pending appeal, and then handled the briefing on the merits that resulted in the D.C. Circuit's June 22 decision undoing the Commission's purported cancellation of NextWave's licenses. And we successfully opposed the Commission's efforts in the D.C. Circuit to stay the issuance of the court's mandate pending the filing of a petition for certiorari. I also served as NextWave's principal outside legal counsel during the negotiation of the settlement agreement that is the subject of this morning's hearing, and participated directly in nearly all of the negotiation sessions.

I would like to begin by extending NextWave's sincere appreciation and thanks to this Committee for the oversight it has devoted to constitutional due process and general Bankruptcy Code issues that have arisen in proceedings initiated by NextWave and other FCC licensees in recent years to reorganize their business affairs under provisions of the Code. The Committee as a whole, and many of its Members individually, have expended considerable effort in recent years to ensure that those congressional protections were applied faithfully and fairly in NextWave's reorganization proceeding and in judicial review thereof. For example, on April 11, 2000, the Commercial and Administrative Law Subcommittee held a hearing on the contention of the Federal Communications Commission that it was exempt from certain provisions of the Bankruptcy Code. As Members of the Subcommittee noted in a subsequent letter to the Speaker, "[e]very member of the subcommittee present at the hearing expressed his concern or disagreement with the FCC's position." Similarly, several Members of the Subcommittee filed an amicus brief in the D.C. Circuit proceedings on behalf of NextWave. For these and other efforts, the company is profoundly grateful.

I am here before you today to report that after years of conflict, there is a proposed consensual resolution of the primary legal controversy that has clouded NextWave's bankruptcy reorganization. The proposed settlement will end long-running litigation, generate \$10 billion in payments to taxpayers, allow consumers to access radio spectrum that has been tied up in the litigation, and provide the foundation from which the NextWave can complete its bankruptcy proceedings and emerge reorganized and able to proceed with its remaining business.

##### BACKGROUND

NextWave was formed in 1995 by a group of experienced telecommunications executives, including the former President of the wireless business at QUALCOMM,

Inc., to participate as a designated entity in the auctions and implement an innovative business plan as a nationwide “carrier’s carrier,” providing wireless services and airtime on a wholesale basis. At the conclusion of the C Block auctions in May and July 1996, NextWave was designated the high bidder for 63 licenses and timely made its \$474 million down payment on such C Block licenses. NextWave then executed promissory notes for the remaining amounts due to purchase its C Block licenses.<sup>2</sup>

NextWave moved quickly to implement its business plan and raised more than \$600 million to finance its down payments to the FCC and the initial build-out of its network. By early 1997, NextWave had hired over 600 employees and contractors, and had opened 22 offices across the country. NextWave also secured more than \$2 billion in financing commitments from major vendors for deployment of network equipment. Within months, NextWave had ninety percent of the microwave links needed to launch service, had acquired seven switch sites, designed more than 1300 cell sites, signed more than 300 site leases, and negotiated an additional 900 leases. NextWave expected to begin commercial service in four markets by late 1997, and had completed network engineering designs for 22 of its major markets, including New York, Los Angeles, Chicago, and Boston. NextWave had also obtained airtime purchase commitments for in excess of 35 billion minutes of use.

Unfortunately, spectrum markets declined dramatically during 1997, primarily due to the availability of additional spectrum that was made available through auction, at the very time NextWave was attempting to raise capital and launch service.

Despite its efforts to remain solvent, NextWave was forced to curtail its operations, laying off more than 500 employees and contractors. By this time, NextWave owed (in addition to its FCC obligations) more than \$400 million to creditors, and faced attachment proceedings and other litigation across the country. To preserve assets for the benefit of creditors, and to sustain the company as an ongoing venture, NextWave was forced to seek bankruptcy protection.

On June 8, 1998, NextWave filed for relief under Chapter 11 of the Bankruptcy Code. Pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code, the NextWave have operated their businesses and managed their properties as debtors-in-possession.

#### LITIGATION BETWEEN NEXTWAVE AND THE FCC

Following extended litigation in the Bankruptcy Court and the Second Circuit, NextWave prepared to emerge from bankruptcy. Aided by improved market conditions, NextWave submitted a plan of reorganization in December 1999. That plan would have cured all alleged defaults in installment payments to the FCC, permitted NextWave to meet all FCC obligations going forward, and paid all creditors *in full*, including interest and late fees. Indeed, NextWave went further and offered to make an immediate cash payment to the FCC of \$4.3 billion—thereby paying for the licenses seven years earlier than required. 244 B.R. at 262. The plan was set for confirmation on January 21, 2000.

On January 12, 2000, the FCC issued a Public Notice declaring that the NextWave C and F Block licenses were cancelled retroactively to January 1999 due to a failure to make postpetition installment payments. In response to the Public Notice, the NextWave pursued two parallel courses with respect to the Public Notice: (i) in the Bankruptcy Court and, on appeal, in the Second Circuit; and (ii) in the Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”).

In response to an Order to Show Cause filed by the NextWave seeking to void the Public Notice, the Bankruptcy Court found that the attempted cancellation of the C and F Block licenses was ineffective due to, *inter alia*, certain provisions of the Bankruptcy Code. Subsequently, however, in response to a petition for writ of mandamus filed by the FCC, the Second Circuit found that bankruptcy courts lack jurisdiction to review regulatory actions such as the Public Notice. Specifically, the Second Circuit opined that “[e]ven if the bankruptcy court is right on the merits of its arguments against revocation,” that court simply “lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped.” *In re FCC*, 217 F.3d 125, 139 (2nd Cir. 2000). The Second Circuit emphasized that “NextWave remains free to pursue its challenge to the FCC’s regulatory acts” in the D.C. Circuit, *id.* at 140, and refrained from commenting “on the prospects” of any such appeal. *Id.* at 129.

<sup>1</sup>In subsequent auctions, NextWave was the high bidder for 27 F Block licenses and made timely down payments on those licenses of approximately \$25 million.

On February 11, 2000, NextWave filed a petition for reconsideration of the Public Notice with the FCC. NextWave also filed a precautionary appeal with the D.C. Circuit. On June 22, 2000, that appeal was dismissed pending resolution of the reconsideration petition. On September 6, 2000, the Commission denied the reconsideration petition, and, shortly thereafter, scheduled NextWave's licenses for reauction on December 12, 2000 (such reauction referred to hereinafter as "Auction 35").

Following the FCC's denial of NextWave's petition for reconsideration, NextWave appealed to the D.C. Circuit. In such appeal, the NextWave asserted, as they had before the Bankruptcy Court, that cancellation of the C and F Block licenses violated several provisions of the Bankruptcy Code, including §§ 362, 525, 1123 and 1124, as well as established principles of due process and fair notice.

On June 22, 2001, the D.C. Circuit issued a ruling on the NextWave appeal, reversing the FCC's purported cancellation and holding that cancellation of the NextWave C and F Block licenses violated Section 525(a) of the Bankruptcy Code (the "D.C. Circuit Opinion"). Section 525(a) provides, in relevant part, that a "governmental unit may not . . . revoke . . . a license . . . to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title." The D.C. Circuit concluded that the NextWave licenses had been revoked solely because the NextWave had not paid a dischargeable debt, which revocation thus violated the Bankruptcy Code and reversed the Commission's purported cancellation. The Court stated: "Applying the fundamental principle that federal agencies must obey all federal laws, not just those they administer, we conclude that the Commission violated the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy." The D.C. Circuit made clear that the FCC had asked for the judicial creation of a "regulatory purpose" exception to that prohibition, but that Congress had not created such an exception. 254 F.3d at 151.

On August 6, 2001, the FCC filed a Motion to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari with the D.C. Circuit. Therein, the FCC indicated that the Acting Solicitor General had authorized the filing of a petition for certiorari with respect to the D.C. Circuit Opinion with the United States Supreme Court and requested that the D.C. Circuit stay issuance of the mandate pending resolution of same. On August 23, 2001, the D.C. Circuit denied the Stay Motion, noting that "the FCC has not demonstrated that the petition would present a substantial question" warranting Supreme Court review.

On August 30, 2001, the D.C. Circuit issued its mandate, thereby formally concluding the proceedings before it. On August 31, 2001, the FCC issued a Public Notice announcing that it had returned the NextWave licenses to active status.

On October 19, 2001, the FCC filed a petition for writ of certiorari with the United States Supreme Court requesting review of the D.C. Circuit Opinion. Certain of the high bidders in Auction 35 also filed certiorari petitions with the Supreme Court. Given the proposed settlement agreement, NextWave requested and received a sixty day extension of the time within which to respond to such petitions. It is contemplated under the settlement agreement that the petitions for certiorari will be withdrawn at the time the FCC receives the C Block and F Block licenses.

#### AUCTION 35 AND INTERVENTION BY WIRELESS CARRIERS

As indicated above, following the issuance of the Public Notice, the FCC scheduled and held Auction 35 which, while it included certain other licenses, was primarily a reauction of NextWave's C and F Block licenses. The 30 MHz C Block licenses held by NextWave were divided into three 10 MHz licenses and bidders for certain of those 10 MHz licenses were not limited to designated entities. Further, Auction 35 was specifically held subject to resolution of the litigation with NextWave over the C Block and F Block licenses. Even taking into account these factors, however, the results of Auction 35 indicated that the market value of spectrum had significantly increased during 1999–2001. The aggregate bids for NextWave's licenses were \$15.85 billion. Alaska Native Wireless ("ANW"), Verizon Wireless ("Verizon"), Salmon PCS ("Salmon"), and VoiceStream Wireless ("VoiceStream") were responsible for over \$13.72 billion of such bids.

#### THE REORGANIZATION PROCESS

NextWave's goal has always been to be a nationwide provider of wholesale wireless telecommunication services. Throughout the bankruptcy cases, NextWave has worked toward this goal and on several occasions has sought to confirm a plan of reorganization providing significant present and/or future value to its creditors and equity interest holders—many of whom invested money or services in NextWave in 1996 or 1997. NextWave first filed a plan on June 25, 1999 (the "Original Plan")

which proposed payment to creditors in connection with the proposed commercial launch and operation of a nationwide wireless network. Due to various developments in the litigation with the FCC, the Original Plan was modified in December 1999 to fully cure and reinstate the FCC's claims and pay other creditors amounts owed as of the bankruptcy filing. The Original Plan, as modified, was scheduled for confirmation in January 2000 and contemplated the build-out of a nationwide wireless network within 12 to 18 months. The Original Plan was, however, subsequently abandoned when it became clear as a result of a variety of events within and outside the litigation with the FCC that it had become unconfirmable.

Notwithstanding the disruptions to the reorganization process throughout the course of the bankruptcy proceedings, NextWave has proceeded to the extent possible with the build-out of the network. For example, network architecture and preliminary radio frequency designs were completed for the top 40 markets. In June 2001, NextWave obtained court approval for debtor-in-possession financing sufficient to achieve initial build-out of all of its markets with a full commercial build in the D and E markets. This build-out has continued with the signing of vendor contracts and the purchase and installation of base stations and switches in certain markets. The NextWave remain on schedule to launch commercial service in the markets covered by its D Block and E Block licenses—which were paid for in full and are not the subject of this litigation—during 2002.

Following the DC Circuit Opinion, NextWave filed a Second Plan of Reorganization. The Second Plan provided for payment in full of all creditors, including the FCC, and proposed financing commitments of approximately \$5 billion to fund the build-out and commercial launch of a nationwide wireless 3G network. The Second Plan will, however, be superseded by the settlement agreement, should Congress conclude that it is in the public interest and enact the legislation necessary to implement it.

#### SUMMARY OF THE SETTLEMENT AGREEMENT

The Settlement Agreement contemplates, in sum, that the litigation and the regulatory disputes between the FCC and NextWave will be fully and finally resolved. As a result, NextWave's C Block and F Block licenses, which have been subject to the cloud of litigation, and NextWave's D Block and E Block licenses, which have been caught up in the delays caused by the dispute with the FCC would be put immediately to productive use. The following is a brief overview of the transactions and procedures encompassed in the Settlement Agreement.

- (a) The Parties will seek legislation authorizing the FCC and Department of Justice (the "DOJ") to settle with NextWave as set forth in the Settlement Agreement.<sup>2</sup> The proposed legislation further appropriates the funds required to implement the settlement between the FCC and NextWave and provides for an expedited appellate review process for challenges to the Settlement Agreement or transactions contemplated thereunder.
- (b) Pursuant to § 363(b) and (f) of the Bankruptcy Code, NextWave's C Block and F Block licenses will be returned to the FCC.
- (c) Upon fulfillment of the conditions set forth in the Settlement Agreement including (i) enactment of the Legislation; (ii) occurrence of the Final Bankruptcy Settlement Approval Date; and (iii) transfer of NextWave's C Block and F block licenses to the FCC, NextWave will become entitled to receive \$9.55 billion (the "NextWave Payment"). The NextWave Payment will be provided for in the legislation and owed once the applicable conditions are satisfied. The NextWave Payment is comprised of \$3.052 billion as a non-refundable advance tax payment (the "Advance Tax Payment") and \$6.498 billion in cash (the "Cash Payment").
- (d) The FCC will retain \$499 million of the deposits NextWave made on its C and F Block licenses. In addition, NextWave is required to make certain other payments to the FCC such that, when added to the Advance Tax Payment and the retention of its deposits, NextWave will have paid the United States \$3.731 billion.
- (e) It is contemplated under the Settlement Agreement that counting the Advance Tax Payment and certain other payments by NextWave and the payments by Auction 35 Participants for the C Block and F Block licenses, the United States and the Commission will receive at least \$10 billion.

<sup>2</sup>Capitalized terms utilized herein without definition are intended to be defined as set forth in the Settlement Agreement.

- (f) Verizon and ANW are required to post letters of credit to secure the payments they owe for their Auction 35 licenses. Conditioned upon the posting of such letters of credit, once NextWave receives the Cash Payment, it is required to pay Verizon and ANW \$118.1 million and \$25 million respectively.
- (g) If Verizon does not post a letter of credit in the amount of \$7,692,113,700 in January 2002, the FCC has the right to terminate the Settlement Agreement. The NextWave Payment is also conditioned on the issuance of an FCC Order approving the Settlement prior to January 10, 2002 and final resolution of any litigation relating to bankruptcy approval of the Settlement.
- (h) In accordance with its normal regulatory proceedings and authority, the FCC will act upon the applications to issue the Auction 35 licenses to Participating Auction 35 Winning Bidders.

NextWave and the FCC have both had successes and setbacks in the course of this litigation. While the current posture is that NextWave holds the C Block and F Block licenses, as the Committee is aware, the FCC filed its Petition for Writ of Certiorari in the Supreme Court seeking review and reversal of the D.C. Circuit Opinion rendered in favor of NextWave.<sup>3</sup> Although NextWave believes that certiorari is likely to be denied and that in any event the D.C. Circuit decision is correct and would likely be affirmed by the Supreme Court if review is granted, NextWave would suffer from further litigation expense and delay if the Supreme Court should choose to review the case on the merits, and would also run the risk that NextWave might not ultimately prevail in such a proceeding.

Although NextWave is confident the Supreme Court would affirm the D.C. Circuit's Opinion, the Company has concluded that the cost of continued litigation is outweighed in light of the benefits to creditors and other stakeholders afforded under the Settlement Agreement.

Neither side can predict with certainty what the Supreme Court's ruling would be should this case be heard, but at this point, both sides are willing to eliminate that risk by fairly settling this case in a way that benefits all parties. Even in the unlikely event of the grant of certiorari by the Supreme Court and a subsequent ruling against NextWave, the litigation would not be ended. The proceedings would then return to the D.C. Circuit for consideration and review of NextWave's remaining claims, including due process and fair notice claims. This case has been ongoing for over three years and without settlement could proceed well into 2003 or later before resolution. The parties and their counsel involved in these cases have spent extensive time and substantial amounts of money attempting to resolve this case.

The parties are now at a point where all sides are willing to enter into an agreement that benefits all parties and further avoids costly litigation and delay. NextWave and the FCC will put years of litigation behind them with a positive recovery for the government; the Auction 35 Participants will put the spectrum covered by the C Block and F Block licenses into immediate use; NextWave's creditors will finally get paid, and NextWave's equity holders will benefit as well. NextWave will be able to complete its reorganization, distributing substantial value to stake holders and then proceed to complete the commercial launch of service in the markets covered by the D Block and E Block licenses (primarily Detroit, Michigan and Madison, Wisconsin).

This is a rare case in which the resolution, while not the absolute outcome any party would unilaterally select, is one that benefits all parties. The FCC and the government will receive at least \$10 billion, more than twice the amount NextWave bid on the licenses at the original auction. In contrast, as matters now stand, NextWave's obligation to the FCC in the upcoming year will be to pay approximately \$850 million, and its *total* obligation to the FCC for the licenses will amount to only approximately \$5 billion. The settlement thus provides the United States with \$10 billion in 2002—ten times what it would otherwise receive in that year from NextWave. The Auction 35 Participants will receive the C Block and F Block licenses. This will enable these carriers, some of whom are currently or might in the future suffer from spectrum capacity constraints, to provide critical wireless services to consumers and may expedite the provision of third generation wireless technology.

The settlement also benefits NextWave. While NextWave will be foregoing the opportunity to fulfill the vision for which it has struggled so long—that of becoming the first nationwide carriers' carrier providing third generation services on a whole-

<sup>3</sup>See *NextWave Personal Comm. Inc. v. Federal Comm. Comm'n*, 254 F.3d 130 (D.C. 2001).

sale basis—its creditors will receive payment in full and its shareholders will realize a return on their equity investments. When combined with the fact that the D Block and E Block licenses provide an opportunity for an ongoing business, albeit on a significantly reduced scale, the compromise is in the best interests of all concerned.

Each party in this complex dispute benefits substantially, but each party gives up something substantial as well. Although the Company will be able to move forward and build out a network in the five markets where it will continue to hold licenses (including Detroit, Michigan and Madison, Wisconsin), the scale of its immediate future operations will be much smaller than would have been possible had NextWave retained all the licenses it currently holds. To understand why this compromise is fair, it is important to understand what NextWave has given up. NextWave made the decision that it was the right thing to do for its shareholders to accept this settlement, but that decision meant real and substantial lost opportunities for the Company.

*Loss of past opportunity.* In January 2000, NextWave proposed a plan of reorganization that would have allowed it to emerge from bankruptcy and would have paid the FCC in full for NextWave's license obligations. The FCC, however, rejected NextWave's proposal and tried to cancel NextWave's licenses. The D.C. Circuit ruled in June 2001 that the FCC's actions were unlawful. Had the FCC's unlawful action not been prevented from executing its plan in January 2000, NextWave would be a fully operational wireless carrier by now, providing service across the country. By way of comparison, another wireless carrier, VoiceStream, which has a national footprint comparable to that of NextWave, was sold for \$29 billion after a little over two years of operation. That is an opportunity that has already been taken from NextWave.

*Loss of the present value of the spectrum.* As a result of the D.C. Circuit's ruling in June 2001, and its subsequent decision denying the FCC a stay, the spectrum licenses that are the subject of this settlement have been returned to NextWave, and NextWave is in full possession of them and able to use them. The FCC's reauction of those licenses established their market value at \$15.85 billion. NextWave's present obligation to the FCC for those licenses is approximately \$5 billion payable over the next several years.

*Loss of future opportunity.* After the D.C. Circuit ruled in June 2001 that NextWave rightfully holds the licenses, the Company again assembled a new plan of reorganization, and arranged for financing, that would allow it to emerge from bankruptcy, build out its nationwide wireless network, and become operational. Based on the value the market has placed on the spectrum alone, it is likely that NextWave would become a company of significant value in the very near future.

This Settlement Agreement is the clear result of arm's length bargaining. The parties have been involved in an ongoing legal battle for years with which the Committee is familiar. Over the past several years, the parties have attempted on various occasions to discuss settlement alternatives. The Settlement Agreement itself has taken months to negotiate given the complexity of the issues involved. The negotiations were clearly arms length and have resulted in an Agreement where each party benefits, but also has had to abandon achieving its particular view of the appropriate outcome of litigation—the true description of a compromise.

Mr. BARR. Mr. Roberts, you are recognized for an opening statement if you would, please.

#### **STATEMENT OF STEPHEN M. ROBERTS, ELDORADO COMMUNICATIONS, LLC**

Mr. ROBERTS. Thank you, Chairman. Thank you, Chairman Barr, Chairman Coble, Members of the Subcommittee. I appreciate the opportunity to appear in front of the Subcommittees today.

We are a small business that participated in the FCC's Auction number 5 C-block licenses in 1996. We strongly oppose the current form of settlement that has been entered into by the FCC, NextWave, Verizon, AT&T Wireless and the other larger wireless carriers.

C-block auction, Auction 5, was intended to benefit small businesses, minorities, and businesses owned by women. NextWave bid a total of \$4.72 billion for 63 licenses. We paid—bid \$5.8 million for our three licenses.

Mr. NADLER. You paid or—

Mr. ROBERTS. I bid \$5.8 million. These guys bid \$4.72 billion. All the winning bidders put 10 percent down. As a result of NextWave's aggressive bidding which drove license prices up, virtually no financing was available for C-block winners to build out their licenses. The FCC recognized this and gave the licensees three choices: forfeit the down payments and return the licenses; number two, forfeit half the down payment, return half the licenses; or number 3, keep the licenses and pay up the full amount.

Eldorado, like most of the small companies, some 75 or 80 companies, elected to return the licenses. Let us all keep in mind that 89 bidders finished this auction and 75 or 80 of them turned in some or all of their spectrum. NextWave at that point owed a total of \$4.72 billion to the U.S. Government, but rather than following the FCC's conditions, NextWave just didn't pay. When the FCC sought to enforce payment or recapture the licenses, NextWave declared bankruptcy. After 5 years of legal wrangling in Auction 35, FCC reaucted the NextWave licenses to Verizon, Cingular, AT&T, and other carriers who bid about \$16 billion for the original four-some-odd billion dollars worth of licenses.

Now, subsequent to that auction, the bankruptcy court ruled the licenses were assets that were bankrupt and ordered that they be returned to NextWave. The FCC and the Justice Department sought review by the U.S. Supreme Court, which is still pending. Nonetheless now the FCC has reached a settlement with NextWave and Auction 35 winners which excluded the Auction 5 winners who played by the rules and excluded the public from the process. Now, they have agreed that the FCC is going to give the NextWave folks 9.55 billion, with a B, dollars for licenses it never paid for, never built out, and never operated, which comes up to about a 20 times return on the auction deposit that NextWave put down.

So here is the outcome of the settlement: 9.55 billion for NextWave. After you take off some taxes, I think it is about 6.55 billion, which is still about, oh, 14 some odd times return on investment. And this is to the very party who violated the FCC's conditions. The small companies like us who turned in their licenses have lost their deposits, and they lost the business opportunities that this Congress intended them to have when they put the authorizing legislation up for those original auctions.

Now, the settlement negotiations have been held in secret. Now, we found out about them through the press, and now the participants demand that you all, that is Congress, step up to the plate and take this settlement or leave it by December 31.

Now, if your Subcommittees don't give the judicial aspects of settlement a thorough review, I don't think any other body will. The FCC is an active participant, and I don't know, just human nature being what it is, that we can be a neutral arbiter. And what about courts? Under NextWave legislation, this settlement is effectively protected from judicial challenge. Interested parties won't have the opportunity to oppose the settlement in any forum unless the FCC solicits comments. Once the FCC approves the settlement, its decision will be nonreviewable except on constitutional grounds. No court will have the authority to invalidate an FCC order approving the settlement even though that order is arbitrary, capricious, or

contrary to law. After 10 days it will be impossible to even file a constitutional challenge to the legislation. On the 11th day after the FCC issues an order approving settlement, no court will have the authority to reverse the order even if the FCC has acted unconstitutionally. Finally, the legislation warns that persons who file actions after the 10-day period or who are found to lack substantial justification, whatever that is, are subject to significant penalties.

Mr. ROBERTS. You are as a Subcommittee to look closely at the settlement from both a legal and a fairness standpoint. If any legislation is passed, it should restore the opportunities that lost when El Dorado and other companies turned in their licenses.

This can be done by requiring the FCC to first return the forfeited down payments of winning auctions by small businesses, and reimburse their actual and opportunity costs for participation in the auction from the proceeds of any settlement that NextWave ends up with; and, two, to compensate them for their lost opportunities by providing substantial bidding credits for use in future spectrum auctions.

As you all consider your position on the settlement legislation, I ask that you measure against three basic principles:

Number one, fairness. Congress's original purpose with respect to wireless licensees was to give small business women and minorities the opportunity to participate in the communications revolution.

Number two, fairness. The parties who play by the rules, like El Dorado, should not be penalized for doing so while those who don't play by the rules are rewarded.

And, number three, fairness. Equal access to all of the administrative processes of our Government and to the courts when those processes fail them.

It is an honor to appear before you all today, and I thank you for the invitation.

Mr. BARR. Thank you, Mr. Roberts.

[The prepared statement of Mr. Roberts follows:]

PREPARED STATEMENT OF STEPHEN M. ROBERTS

Mr. Chairman and Members of the Subcommittee:

My name is Stephen Roberts and I am Managing Director of Eldorado Communications, LLC. I appreciate the opportunity to appear in front of the committee today. We are a small business that participated in the FCC's Auction 5 of C block PCS licenses in 1996.

We strongly oppose the current form of the "settlement" that has been entered into by the FCC, NextWave Communications, Verizon Wireless, ATT Wireless and other large wireless companies.

The C block auction, Auction 5, held in 1996, was intended to benefit small businesses, minorities, and businesses owned by women. NextWave bid a total of \$4.72 billion for its 63 licenses. We bid \$5.8 million for our 3 licenses. All winning bidders put 10% down. As a result of NextWave's aggressive bidding, which drove license prices up, virtually no financing was available for any C block winner for build out of the licenses. The FCC recognized this and gave licensees three choices: (i) forfeit their down payments and return the licenses; (ii) forfeit half the down payment and return half the licenses; or (iii) keep the licenses and pay the full amount. Eldorado, like most of the small companies—some 75–80 licensees—elected to return the licenses.

NextWave owed a total of FCC \$4.72 billion. But rather than following the FCC's rules, Nextwave just didn't pay. When the FCC sought to enforce payment or recapture the licenses, NextWave declared bankruptcy. After five years of legal wrangling, in Auction 35, the FCC re-auctioned the NextWave licenses to Verizon Wireless, Cingular, ATT Wireless and other carriers, who bid a total of nearly \$16 billion for the licenses. Subsequent to the auction, a bankruptcy court ruled that the li-

censes in question were assets of the bankrupt. The FCC and the Justice Department petitioned the US Supreme Court for a Writ of Certiorari, which the Court has not yet ruled on. Despite the pendency of the petition, the FCC began negotiations with NextWave and the Auction 35 winners, excluding the Auction 5 winners and the public from the process. Despite Eldorado's request that secret negotiations be halted and the process opened up to the public, the FCC, NextWave, and the Auction 35 winners have reached a "settlement" among themselves and without any public participation.

They have agreed that the FCC will "buy back" from NextWave these defaulted licenses for \$9.55 billion. (\$3 billion will be reserved for taxes). In other words, NextWave will receive \$9.55 Billion for licenses it never paid for, never built out, and never operated. Even after taxes, that leaves NextWave with a net \$6.5 billion, about 14 times the auction deposit that NextWave paid, which is its only investment in these licenses.

So, the outcome of the settlement is: (i) a \$9.55 billion windfall for NextWave, the very party who violated the FCC's rules; (ii) the licenses are being transferred mostly to companies who were not eligible to buy them in the original auction; and (iii) the small companies, who were forced to turn in their licenses have lost their licenses, their bidding deposits and they have lost the business opportunities Congress intended them to have.

A detailed list of reasons the Nextwave settlement is not in the public interest is attached as Exhibit A.

Prior to settling with NextWave, the FCC itself said: "It would be unfair to permit a licensee that could not satisfy its bid to file for bankruptcy, tying up the spectrum in the process, and then emerge from bankruptcy at some later time and retain the licenses, while others that complied with our rules lost their licenses." The FCC has now compounded this unfairness by excluding the companies harmed by NextWave from the settlement, by turning its back on the Congress' goal of bringing small businesses and minority and women-owned companies into the telecommunications industry, and by making no effort to restore the opportunities that were lost when these companies turned in their licenses.

To our knowledge, no bidders from the original C block auction who returned their licenses were involved in this settlement, nor did the FCC seek public comment on the issues presented by the negotiations. The FCC still has maintained a secret process. In order to shed some light on the process, Eldorado filed a Petition for Emergency Relief on November 7, 2001 (see Exhibit B), asking the FCC to:

- (a) halt all private meetings and negotiations of the Commission and its staff with representatives of NextWave and others;
- (b) provide for immediate access of Eldorado, all persons similarly situated, and the public to complete information in the possession of the Commission regarding negotiations reportedly now in progress;
- (c) provide public notice and initiate an open proceeding for the consideration of any disposition of the NextWave licenses and consideration of the circumstances surrounding the frustration of Congressional and Commission public policy objectives in reserving the C Block licenses for small business and other designated entities; and
- (d) bring all Commission activities regarding the NextWave licenses into conformity with the requirements of the Administrative Procedures Act, the Commission's own rules and regulations, the U.S. Constitution, and other applicable law and regulations.

The dominant characteristic of the NextWave settlement is the parties' desire for extraordinary speed in approving the settlement, while shielding it from public scrutiny and preventing review by an independent body.

Despite five years of delay, NextWave and the others now have decided that Congress must approve the settlement by December 31, 2001, at a time when Congress is dealing with critical national security, financial stimulus, and government budgetary issues. Proposed legislation is being presented to Congress on a take-it-or-leave-it basis. Furthermore, NextWave's preferred approach is to have no review by the telecommunications and judiciary committees of the House or Senate. Rather, they want a fast-track appropriations process, perhaps bringing their bill directly to the floor in the form of an appropriations rider.

If your committee does not carefully review this settlement, it is unlikely that the FCC or the courts would or could do so. The FCC, as a key participant in the settlement, is not a disinterested arbiter capable of determining the public interest.

And what of the Courts? Under the NextWave legislation, the "settlement" is effectively protected from judicial challenge.

- Interested parties will not have an opportunity to oppose the settlement agreement in any forum unless the FCC solicits comments concerning the agreement.
- Even if the FCC solicits comments, once it approves the settlement its decision will be non-reviewable, except on constitutional grounds. No court will have the authority to invalidate an FCC order approving the settlement even though that order is arbitrary, capricious, or even contrary to law.
- After an unusually short time, it will be impossible to file even constitutional challenges to the legislation and the settlement. On the 11th day after the effective date of the legislation, no court will have the authority to invalidate the legislation, even if it is unconstitutional. On the 11th day after the FCC issues an order approving the settlement, no court will have the authority to reverse the order, even if the FCC has acted unconstitutionally.
- And opponents of the settlement will be discouraged from seeking their day in court. The legislation warns that persons who file actions that are not commenced within the 10-day periods described above or that are found to lack “substantial justification” are subject to significant sanctions.

We urge this Subcommittee to look closely at this settlement, from both a legal and a fairness standpoint. If any legislation is passed, it should restore the opportunities that were lost when Eldorado and similar companies turned in their licenses. This can be done by requiring the FCC to (i) return the forfeited down payments of winning Auction 5 small businesses; (ii), reimburse their actual and opportunity costs of participation in Auction 5 from the proceeds of any settlement; and (iii) compensate them for their lost opportunities by providing them with substantial bidding credits for use in future spectrum auctions.

As you consider your positions on this settlement and the legislation, I ask that you measure your positions against three basic American principles:

- (i) fairness—the fairness evident in Congress’s original purpose with respect to these wireless licenses—to give small business, women and minorities the opportunity to participate in the business of the communications revolution, and
- (ii) fairness—the fairness of the FCC to not penalize parties like Eldorado who played by the FCC’s own rules while those who broke the FCC’s rules are rewarded; and
- (iii) fairness—the fairness guaranteed by equal access of all citizens to the administrative processes of our Government, and to the Courts of our Land when those processes fail them.

It is an honor to appear before this Subcommittee, and I thank you for the invitation.

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EXHIBIT A

THE NEXTWAVE SETTLEMENT IS NOT IN THE PUBLIC INTEREST

I. Overview

- The Federal Communications Commission, Verizon Wireless, and others have agreed to a “settlement” of matters related to certain wireless communications licenses won by NextWave Communications in the FCC’s Auction 5, held in 1996. The auction was intended to benefit small businesses, minorities, and businesses owned by women.
- NextWave bid up the value of the licenses, eventually winning 63 licenses for a total value of \$4.72 billion and like all other bidders, made a downpayment of 10%, or \$472 million. As a result of the high prices bid by Nextwave, no additional financing was available for C block owners to construct the licenses. The FCC recognized this and proposed a program whereby bidders could (i) forfeit their down payment and return the licenses purchased; (ii) forfeit half the down payment and return half their licenses ; or (iii) keep the licenses and pay the full amount bid in the auction. The majority of successful bidders—estimated at between 75 and 80 bidders—elected to return the licenses. NextWave, however, failed to pay the FCC for its licenses and then declared bankruptcy.
- The FCC rejected NextWave’s efforts to keep its licenses by using the bankruptcy ploy and re-auctioned the NextWave licenses. Verizon Wireless, Cingular, ATT Wireless and other carriers won the licenses at the January 2001 re-auction (Auction 35) by bidding a total of nearly \$16 billion. NextWave, however, prevailed upon one federal court of appeals to protect

the NextWave licenses as “assets” of the bankrupt, rather than as assets of the public, and the court ordered the FCC to return the licenses to NextWave. Another Federal Circuit Court disagreed, and the FCC appropriately sought US Supreme Court review—in a petition for certiorari that is still pending, and that, for some reason, the FCC has now determined to abandon.

- NextWave, the FCC, other federal agencies, and the carriers who won the re-auctioned licenses have now agreed to a “settlement” that will entitle NextWave to \$9.55 billion from the federal treasury, with the IRS moving \$3.052 of that sum from one pocket to another as an “advance tax payment” from NextWave, which will leave NextWave with \$6.5 billion. Under this “settlement”, the big carriers will pay the government \$10 Billion, instead of \$16 billion the same parties bid for the same licenses during their re-auction (Auction 35). And the carriers will get the licenses—at a \$6 Billion discount. No provision has been made for the small businesses or minority and women-owned enterprises who participated in the NextWave tainted auction, followed the FCC’s rules, and lost money and business opportunities as a direct result of NextWave’s gaming of the auction process.
  - Prior to settling with NextWave, the FCC itself said:
 

“Some of the licensees that complied with our orders actually forfeited their licenses because they could not ultimately meet their bid obligations. It would be unfair to permit a licensee that could not satisfy its bid to file for bankruptcy, tying up the spectrum in the process, and then emerge from bankruptcy at some later time and retain the licenses, while others that complied with our rules lost their licenses.” FCC Order of Reconsideration 15 FCC Rcd 17500 at 17514 (September 2000).
  - The FCC has now compounded this unfairness by excluding the companies harmed by NextWave from the settlement, by turning its back on the goal of bringing small businesses and minority and women-owned companies into the telecommunications industry, and by making no effort to restore the opportunities that were lost when these companies turned in their licenses.
- II. The proposed settlement is unfair to the small businesses and minority and women-owned companies who were supposed to benefit from the auction that NextWave tainted.
- These companies lost hundreds of millions of dollars when they forfeited their bidding deposits and incurred the significant costs of participating in Auction 5, including the costs of engineering, financing, and consultants.
  - In January 2001, however, the biggest players in the wireless business bid almost \$16 billion for NextWave’s \$4.72 billion worth of licenses. This suggests that Auction 5 licenses today are worth more than three times what they were worth five years ago. The companies that followed the FCC rules turned in their licenses and lost the value of the licenses they could have retained—had they, like Nextwave, only violated the FCC’s rules.
  - These companies also have lost the business opportunities inherent in mobile telephony, the fastest growing part of the telecommunications market. It is obvious that the carriers who are taking over the NextWave licenses anticipate substantial operating profits and that NextWave has been well compensated for tying up those licenses. The companies that complied with FCC rules and turned in their licenses, however, gave up the business opportunities that the carriers will now enjoy. They will not be compensated for those lost opportunities at any level, let alone the windfall level that NextWave will achieve.
  - The loss of licenses, the costs of auction participation, and the opportunity costs suffered by the Auction 5 winners who were forced to return their licenses amount to billions of dollars. One only has to look at the more than \$9.55 billion that the government will pay to Nextwave in this settlement in order to understand the magnitude.
- III. The settlement takes \$6.5 billion from the U.S. Treasury and gives it to a company that has never provided a minute’s worth of telephone service and puts additional licenses into the hands of carriers who already dominate the wireless business.
- NextWave has not constructed facilities and has not provided mobile telephone service to the public. In short, NextWave has met none of the requirements that the FCC imposed upon all Auction 5 winners, indeed upon all auction winners. Without NextWave’s construction and operation of their

enormous Auction 5 holdings, small business Auction 5 winners confronted a reduced demand for service from potential customers, the drying up of their financing, and the inability to dispose of their licenses profitably. As a result of their participation in Auction 5 gone awry, they will enjoy no benefit from the “settlement, no opportunity to benefit as Congress intended. Not so NextWave.

- Not so the carriers. The big carriers who will now end up with the NextWave licenses. They are the dominant players in the mobile telephone business and the antithesis of kinds of companies that were intended to benefit from Auction 5. The top three wireless carriers in the U.S. have over 58 percent of the total number of wireless subscribers in the country. These carriers are the big winners in the scramble for NextWave licenses. Verizon Wireless, the biggest winner, already has more than 26 million subscribers and has a service “footprint” covering more than 90 percent of the U.S. population, 49 of the top 50 and 97 of the top 100 U.S. markets. Verizon Wireless’ parent, Verizon Communications Inc., is the largest phone company in the U. S. Cingular Wireless, another big winner in the NextWave scramble, has 20.5 million subscribers, while AT&T Wireless has 17 million subscribers.
- IV. The dominant characteristic of the NextWave settlement is the parties’ desire for extraordinary speed in approving the settlement, while shielding it from public scrutiny and preventing review by an independent body. What’s the rush, what are they afraid of?
- Despite five years of delay and administrative and judicial wrangling, the FCC and the settling parties now have decided that time is so much of the essence that the “settlement” must be approved by Congress by December 31, 2001, even though Congress is in the midst of critical national security, financial stimulus, and government budgetary issues.
  - The reason given for such unprecedented haste is the need to provide mobile telephone service to the public. But, when constructed, these mobile systems will be the third or fourth to offer service in their respective markets and will be added to the already bulging bag of radio systems operated by Verizon Wireless, Cingular, and ATT Wireless.
  - The settlement was negotiated in secret in violation of the letter and the spirit of the Government in the Sunshine Act, the Administrative Procedures Act, and the Communications Act, as well as Congress’s intention to provide for participation of small business, minorities and women in the wireless build-out. It is unclear at this time whether the FCC ever will provide an adequate forum for public comment on the settlement terms. In any event, FCC approval of the settlement is a foregone conclusion, because the FCC was a key participant in the settlement and is now hardly a disinterested arbiter capable of determining the public interest.
  - Nor will the Courts be able to provide meaningful independent review or relief. NextWave and the others propose to clip the judiciary’s wings. There must be no court review of the legality of the settlement. In addition to codifying NextWave’s lightning fast raid on the Treasury, the legislation that accompanies the settlement would prevent such review. Only the Circuit Court of Appeal for the District of Columbia Circuit could review FCC action on the settlement, but that Court would have no power to issue a stay, and its review would be limited only to constitutional issues. Throughout even the limited review provided, both the Court of Appeals and the US Supreme Court would be required to clear their dockets to deal with this case above all others, and do so on an expedited basis. Anyone who would even dare to seek court review without “substantial justification” is threatened with sanctions.
  - NextWave’s and the carriers’ approach to Congress stresses the need for speed and the desire to avoid review. The proposed legislation is presented to Congress on a take-it-or-leave-it basis and there would be no review by the telecommunications and judiciary committees of the House or Senate. NextWave’s and the carriers want a fast-track appropriations process perhaps bringing their bill directly to the floor in the form of an appropriations “rider.”

The entire course of this “settlement” leaves a bitter taste in one’s mouth—a taste of unfairness—an unfairness born of public business done in private; of denial of Congressional purpose, and denial of lawful and Constitutional process.

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EXHIBIT B  
BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

Disposition Of Certain C Block Wireless  
Communications Licenses Held By NextWave  
Personal Communications, Inc. Or Its Affiliates

PETITION FOR EMERGENCY RELIEF

Eldorado Communications, LLC (“Eldorado”), by its attorneys, hereby files the following Petition for Emergency Relief (the “Petition”). Eldorado participated in FCC Auction No. 5, where it secured certain C Block wireless communications licenses. Eldorado had to return those licenses to the Commission, at substantial cost, as the result of the disruptive bidding strategies and post-award defaults of Nextwave Personal Communications, Inc. and its affiliates (“Nextwave”).

If, as reported in the press, the Commission continues to participate in the settlement of the on-going dispute with NextWave and the companies who were the high bidders for the recaptured NextWave licenses at Auction 35, the injury to Eldorado and others will be compounded. In order to avoid irreparable harm to Eldorado and similarly situated companies, the Commission must establish a fair and open public process for the disposition of the NextWave licenses and cease to foreclose access to and participation in that process by Eldorado and other interested parties.

SUMMARY

As discussed more fully below, Eldorado petitions the Commission to:

- (e) halt all private meetings and negotiations of the Commission and its staff with representatives of NextWave and others;
- (f) provide for immediate access of Eldorado, all persons similarly situated, and the public to complete information in the possession of the Commission regarding negotiations reportedly now in progress;
- (g) provide public notice and initiate an open proceeding for the consideration of any disposition of the NextWave licenses and consideration of the circumstances surrounding the frustration of Congressional and Commission public policy objectives in reserving the C Block licenses for small business and other designated entities; and
- (h) bring all Commission activities regarding the NextWave licenses into conformity with the requirements of the Administrative Procedures Act, the Commission’s own rules and regulations, the U.S. Constitution, and other applicable law and regulations.

DISCUSSION

Generally reliable trade press recently have reported that the Commission and its staff, representatives of NextWave, Verizon Communications, and others are presently engaged in private negotiations whose objectives appear to be the disposition of licenses to use certain C Block wireless communications frequencies originally and conditionally awarded to NextWave as the result of Auction No. 5. These licenses were reserved for Commission-defined entrepreneurs, small businesses, and other designated entities, in order to implement the Congressional policy to “. . . [avoid] excessive concentration of licenses and [disseminate] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women. . . .” 47 USC 309(j)(3)(B).

Petitioner, relying on the integrity of the Commission’s auction process and the fair administration of the auction rules, won certain C Block licenses by participation in Auction No. 5 and paid the required deposits on them. When, in substantial part as the result of NextWave’s high-bidding strategies and the consequent wave of investor reluctance to fund construction, the financial viability of licensed PCS operations was jeopardized, the Commission offered C Block licensees three options: return their licenses and avoid further obligations; pay half the successful bid for lesser capacity than auctioned; or pay in full. Petitioner was forced by market circumstances to return its licenses.

NextWave won a large number of licenses by bidding what, in light of the then-prevailing market, were extraordinarily high sums. Later, NextWave said it was unable to meet its obligations timely to pay the fees for its licenses and sought relief

from the Commission on the rescheduling of those fees. Thereafter, and notwithstanding such rescheduling NextWave failed to make timely payments and, pursuant to the terms of the auction and the conditional grant, the licenses were cancelled. The Commission placed the licenses on the auction block a second time and they were re-auctioned in Auction No. 35.

Meanwhile, NextWave sought and achieved protection under Chapter 11 of the U.S. Bankruptcy Code, including protection of its claimed assets, the cancelled licenses. A bankruptcy judge ruled the NextWave licenses could not be cancelled because they were protected under Chapter 11. The United States Circuit Court of Appeals for the District of Columbia Circuit, acting on a NextWave appeal from the Commission's cancellation of the licenses, held the licenses protected by the bankruptcy laws and ordered the Commission to return the NextWave licenses to active status, even though NextWave still had not made the required payments. The Commission has petitioned the United States Supreme Court for a Writ of Certiorari, seeking the reversal of the DC Circuit's decision and order.

Now, according to press reports, the Commission is preparing to compound further the damage to Eldorado, others similarly situated, and the public by negotiating, behind closed doors, a "settlement" with a few "affected parties" and a chosen few prospective buyers, which would result in:

- An unfair gain of billions of dollars by NextWave, which subverted the auction process by running up the bidding without an ability to make good on its exaggerated winning bids.
- A loss of billions of dollars to the U.S. Treasury, owing to the difference in the present market value of the subject licenses and the sums actually to be paid to the government for them.
- A material loss of confidence in the fairness and integrity of the FCC's auction procedures and its administration of conditional license grants in the public interest.
- The loss to Eldorado and others of moneys already paid as deposits for C Block licenses, and the loss of future income opportunity, of companies such as Eldorado, who played by the rules and suffered severe financial loss as a result.

Accordingly, due process requires that the Commission call an immediate halt to its participation in the so-called settlement being pursued by NextWave and the large carriers that were high bidders for the recaptured NextWave licenses and open a public notice and comment or comparable proceeding regarding this matter.

#### EMERGENCY RELIEF REQUESTED

Petitioner urgently requests that the Commission:

1. halt all private meetings and negotiations of the Commission and its staff with representatives of NextWave and others interested in the disposition of the NextWave licenses (including without limitation, entities commonly referred to as Verizon Wireless, VoiceStream Wireless, and Alaska Native Wireless);
2. provide for immediate access of Eldorado, all persons similarly situated, and the public to complete information in the possession of the Commission regarding negotiations reportedly now in progress between and among Commission personnel, NextWave, Verizon Communications and its affiliates, and any other persons with whom any of them have met to discuss the disposition of the NextWave licenses;
3. open a public proceeding for the consideration and public comment upon any disposition of the NextWave licenses; and the terms and conditions under which such disposition may be made, to include consideration of the circumstances surrounding the frustration of Congressional and Commission public policy objectives in reserving the C Block licenses for small business and other designated entities; and
4. otherwise, to bring all Commission activities regarding the NextWave licenses into conformity with requirements of the Administrative Procedures Act, the Commission's own rules and regulations, the U.S. Constitution, and other applicable law and regulations.

## CONCLUSION

Eldorado urges the Commission to grant the emergency relief requested above and thereafter act upon a schedule that permits full public comment and careful deliberation of all issues related to the NextWave licenses.

Mr. BARR. Now, I turn to questioning of the witnesses. And we will also adhere to the 5-minute rule.

The Chair recognizes itself for 5 minutes. Both under the terms of the statements today by some Members of the Subcommittees, as well as some of the witnesses, and certainly much of what has been written about this proposal, there are some very serious charges that are flying around; use of words such as “gaming the system,” “unconstitutional.” Certainly, the implication underlying some of the charges is that there is something very improper that has gone on.

We certainly want to explore that and make sure that that is not the case; or, if it is, to be aware of it and take steps to prevent any unjust enrichment.

I would like to address the following questions to Mr. Rogovin and Mr. Bybee as the gentlemen whose aid to the Federal Government agencies are primarily responsible for this.

Has there been, is there any evidence, that any parties, including the Government, through the FCC—as testimony has indicated, there are allegations that the FCC action previously might have caused a decrease in the spectrum value.

Is there any evidence at all that any party, either on the Government’s side or in private industry, gamed the system knowing—in other words, took action knowing that they were going to—or not going to take further action, and thereby become unjustly enriched? Or, is the scenario as it has played itself out here the result of forces beyond the control of those parties that gave rise to the situation?

Mr. Rogovin and then Mr. Bybee.

Mr. ROGOVIN. Mr. Chairman, I have no evidence of gaming of the system. I have no evidence of any party to the negotiation gaming the system in any way. The decision of the D.C. Circuit in June of 2001 was certainly a definitive statement on section 525 and prepared unlawfully in the Commission’s automatic cancellation of the licenses, which put the licenses back in the hands of NextWave.

Mr. BARR. Mr. Bybee.

Mr. BYBEE. Mr. Chairman, I am going to defer to Mr. Hunt on that question.

Mr. HUNT. Mr. Chairman, thank you for having me here as well. I—the Department of Justice has no information or evidence at all that anybody was gaming the system with respect to this agreement and this transaction. I think it is fair to say that the Department of Justice would not be here, the Attorney General would not have submitted the legislation to the leadership and asked that the Congress enact this legislation, if there was any evidence whatsoever that there had been any gaming of the system.

Mr. BARR. Mr. Bybee, I would like to address a couple of questions to you in terms of the constitutionality side that you said you would be available for. The legislation, which codifies this settlement, permits parties to withdraw if Congress decides to exercise its legislative authority to amend the legislation.

As you know, in extraordinary circumstances, Congress waives its right to amend legislation that comes before it. Are the circumstances in this case so extraordinary as to justify congressional abdication of that legislative authority? And, secondly, can you provide to the Subcommittee other examples in which Congress has been asked to ratify, without amendment, a settlement agreement with a private company?

Mr. BYBEE. Let me take the second question first, Mr. Chairman. I don't have any examples at hand. But we would be happy to look in our records and find out whether we can get back to you on that one.

Mr. BARR. If you can do that with some expedition, I would appreciate it.

Mr. BYBEE. Yes, I could do that.

Mr. Chairman, could you offer that first question again?

Mr. BARR. The legislation which codifies this settlement permits parties to withdraw if Congress decides to exercise its legislative authority to amend the legislation.

As you know, in extraordinary circumstances, Congress waives its right to amend legislation that comes before it. Are the circumstances in this case so extraordinary as to justify congressional abdication of its legislative authority?

Mr. BYBEE. My understanding, Mr. Chairman, is that because of the timing of this, that the settlement expires at the end of this month, that if Congress doesn't act immediately, then on January 1st we are right back where we were.

Mr. BARR. So the extraordinary circumstance here is the timing?

Mr. BYBEE. Is the timing. If there is no agreement on January 1st, we are right back where we were, with all of the litigation risks that we presently have.

Mr. ROGOVIN. Mr. Chairman, may I briefly address that question, because we feel strongly that—the Commission—that no circumstance justifies Congress abdicating its authority and its role, and we are not asking the Congress to do that. We are merely, I think, advising the Congress that because of the fragility of the coalition that was at the settlement table, there is no guarantee that after December 31st there will continue to be a settlement agreement. I thank you.

Mr. BARR. Okay, thank you. The Chair is pleased to recognize the Ranking Member of the Subcommittee on Commercial and Administrative Law, Mr. Watt, for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. Mr. Verrilli, you mentioned in your testimony that several Members of Congress had filed an amicus brief on behalf of NextWave. Would you tell us who they are and what were the circumstances that led to that?

Mr. VERRILLI. I will do my best to recall.

Mr. WATT. Tell me who they are first.

Mr. VERRILLI. Representative Conyers, I believe, was one. Giving me a little assistance, if you would just give me 1 minute.

Mr. WATT. Why don't you submit that to us for the record?

Mr. VERRILLI. I will be happy to do that, but we do have it now. It was Representative Conyers, Representative Nadler, Representative Lindsey Graham, and then—

Mr. WATT. So this was on the constitutional issue, the issue of who owned the—the—can you just provide us a copy of what was submitted?

Mr. VERRILLI. I would be delighted to do that.

Mr. WATT. All right. Because, that is not substantive. I just—that just raised my eyebrows a little bit.

Mr. Bybee and Mr. Rogovin, particularly Mr. Bybee; you mentioned the whole issue of—you said that you strongly believe that this is in the public interest. And I started kind of trying to figure out what the public interest is here.

It seems to me that we started with a statute that—or authorizing statute that talked about trying to get a class of spectrum to small minority and women-owned businesses. Am I missing something?

Mr. BYBEE. Mr. Watt, I am going to defer to Mr. Rogovin on the original intent of that.

Mr. WATT. All right. Mr. Rogovin, maybe you can tell me, is that where we started?

Mr. ROGOVIN. Congressman Watt, I apologize. Could you re-ask the question?

Mr. WATT. I am trying to figure out where we started in this process. And I thought where we started was that we were trying to get a—some small part of spectrum and involvement in the communications industry to small minority and womens' businesses. Isn't that where we started?

Mr. ROGOVIN. Yes, Congressman Watt.

Mr. WATT. Well, shouldn't that also be where we end in evaluating what is in the public interest? I guess that is the question that I am most troubled by. It seems to me—I started out thinking that maybe the Government and NextWave were being unjustly enriched.

I think Mr. Verrilli in his testimony at least got me back to neutral on whether NextWave has been unjustly enriched. But I don't know how we can get the Federal Government to where they started out with \$4.9 billion coming to the Federal Government for spectrum, the Federal Government screws up by taking back auctions which a court—spectrum which a court now has said that you shouldn't have taken back, and then the Federal Government ends up getting \$10.031 billion instead of \$4.9 billion, and then you come and tell me that you have done what is in the public interest because you got more money for the Federal Government.

The public interest, it seems to me, was defined by what our original objective was, which was to get these spectrums to somebody other than large carriers, Cingular, all of the big guys.

Mr. ROGOVIN. Congressman Watt, from the perspective of the Commission, the most important feature of this settlement is getting the spectrum out for use. The—

Mr. WATT. By whoever? In absolute disregard of what the Congress has said it wanted to do. So, have you redefined what the public interest is?

Mr. ROGOVIN. No, Congressman. When the program initially started, it was to promote minority and women-owned businesses. And then in the wake of the *Adoran* decision by the Supreme

Court, the Commission's policies were pared back to just small businesses. And as you may know, Auction 35—

Mr. WATT. Cingular is small?

Mr. ROGOVIN. As you may know—

Mr. WATT. Even on that criteria?

Mr. ROGOVIN. Cingular is big.

Mr. WATT. Any of these people who bought the spectrum small?

Mr. ROGOVIN. A number of them have qualified as designated entities by the Commission. And those are the small businesses that are now the feature of the designated entity program.

Mr. WATT. I yield back. My time is over, but I—

Mr. BARR. The Chair announces that we are going to be having a couple of votes on the floor in just a few minutes. But I think if we move forward quickly, we will be able to get one more Member's questions posed and answered. And the Chair recognizes the distinguished Chairman of the other Subcommittee, the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman. Good to have you gentlemen with us. Mr. Bybee, 8 days ago I asked the Department of Justice a question. I asked a subsequent question to DOJ, and then a question to FCC.

At 6:07 last night I received the answer. And I have not been able to thoroughly examine it. I realize you all are busy as we are. The question I wanted, if you can briefly answer this, Mr. Bybee, can you give us the cases where these expedited judicial review procedures have been used in settlements? If you can't do it now, do it at a subsequent date.

Mr. BYBEE. We will be happy to get that to you promptly.

Mr. COBLE. Do you know how many times that has been done, Mr. Bybee?

Mr. BYBEE. I don't know offhand, but we will get a response to you quickly.

Mr. COBLE. Second question, Mr. Bybee. Subparagraph c(4) prohibits a court from granting interlocutory relief effecting the licenses at any time before there is a final judgment on petitions or challenges to the FCC order or this statute, if enacted.

Does this unduly or unconstitutionally restrict a court's jurisdiction, A? And, B, how does this affect the rights of potential challengers?

Mr. BYBEE. Thank you, Mr. Chairman. As I understand it, this provision simply reduces the risk that an adverse decision in the D.C. Circuit would interfere with a settlement. There is precedent in other statutes for such provision. In the North LaGuardia Act, for example, that prohibits courts from enjoining a variety of labor-related activities. The Tax Injunction Act prohibits district courts from enjoining certain State tax collections efforts.

This deprives the court in this case only of a temporary remedy. It does not deprive the court of the ability to issue, for example, a permanent injunction, only an interlocutory injunction. There is other relief available here, Mr. Chairman.

Mr. COBLE. Does the venue selection and expedited review procedures effect a complainant's ability to challenge the settlement?

Mr. BYBEE. I don't believe so, Your Honor; that is, Mr. Chairman. That is—the venue provisions here merely send this to the

District of Columbia Circuit which helps us expedite it. It also helps us avoid the possibility of conflicting decisions.

Mr. COBLE. I thank you. Mr. Chairman, not unlike Mr. Watt, I am troubled by the mathematics here. And I am going to have to go to another transportation hearing, but my staff will be here to assure you that we are interested in this subject. I thank you again for having convened this hearing.

Mr. BARR. We thank the gentleman from North Carolina. Let's again, keeping in mind that we do—we are going to have votes on the floor very shortly, the Chair is pleased to recognize the gentleman from New York, Mr. Nadler, for 5 minutes for questions.

Mr. NADLER. Thank you. My first question, I stated in my opening statement. Mr. Rogovin did not address it in his statement. Given the fact that the FCC was taking a rather speculative, to put it mildly, view of its exemption from the automatic stay provisions of the Bankruptcy Code, and given the fact that Members of this Committee urged it to, at least until the Court of Appeals ruled, to not reauction the licenses so as not to put the Federal Government on the hook potentially for billions of dollars, why did the FCC go ahead in and recklessly do that, now putting the Federal Government on the hook for billions of dollars?

Mr. ROGOVIN. Congressman Nadler, your question is why did we reauction the licenses?

Mr. NADLER. Why, given the possibility—in my opinion the likelihood—we now know the reality—that you were going to lose at the Court of Appeals, and should you lose, you were going to put the Federal Government on the hook for billions of dollars, why did you insist on doing that without—and having been warned about that, why did the FCC insist on doing that, putting the Government on the hook for billions of dollars and creating the mess that we have now that we are trying to get out with this settlement and legislation?

Mr. ROGOVIN. Congressman Nadler, I was not at the FCC at the time. But my understanding is that the decision was made in the wake of two rather strong opinions by the Second Circuit affirming what the FCC had done. And, further, there were attempts to stay the auction by the—in front of the D.C. Circuit, which several times denied those stays.

And—

Mr. NADLER. In other words—reclaiming my time. In other words, you thought because of some rulings by the Second Circuit that you had good odds in the D.C. Circuit?

Mr. ROGOVIN. I think the thinking at the time was that since every auction is challenged, the default choice of the Commission is to go forward with the auctions rather than hold up—

Mr. NADLER. But here there was a rather strong argument, in fact a novel claim by the FCC, that it was exempt from what everybody always thought was the application of the automatic stay. And you are saying that you thought that that argument was supported by some Second Circuit rulings, so you thought you had good odds of winning in the D.C. Circuit and it was worth going ahead with the auctions. Is that correct?

Mr. ROGOVIN. Congressman Nadler, there are extremely strong decisions of the Second Circuit—

Mr. NADLER. I just said that. So, fine. Thank you.

Mr. Verrilli, did the Second Circuit give good grounds to think that the D.C. Circuit would cut the automatic stay provision the way that the FCC wanted it to? In your opinion.

Mr. VERRILLI. Well, Congressman Nadler, as we read the Second Circuit decision, and as it turns out the D.C. Circuit read the Second Circuit decision, what they said really wasn't about the substance of bankruptcy law and whether it applied or not; what they said is that in their view, the proper place for someone to go to challenge an FCC action is the D.C. Circuit; that only the D.C. Circuit could—

Mr. NADLER. So, in other words, the Second Circuit ruled as a matter of venue or jurisdiction, not as a matter of substance, and the FCC was wrong to rely on those circuits for the substance?

Mr. VERRILLI. Yes. That says it perfectly correctly.

Mr. NADLER. Thank you. Let me ask you this, Mr. Verrilli. The press has reported for a group of people who filed for bankruptcy, the NextWave investors stand to do very well in this settlement agreement.

Let me ask you two questions. One, why should the taxpayers fund such enormous profits as part of this agreement for a company that defaulted—filed for bankruptcy and never came close to completing its buildout? And second, given the enormous opportunity lost that you outlined that NextWave is taking by going into this settlement, why in fact is it doing it? Why don't you just take the licenses and build out the system and make a mint?

Mr. VERRILLI. If I can take the second question first. The answer to that question is because NextWave and its board of directors have multiple responsibilities. They have a responsibility to the creditors in bankruptcy, and they have a responsibility to their shareholders. It was the view of the company that all things considered, ensuring fairness for the creditors, and ensuring returns for the shareholders, that it was the right thing to do to take this settlement.

And I would point out, if I could, that the company will still retain several licenses for spectrum for which it has paid for.

Mr. NADLER. And the first question?

Mr. VERRILLI. I am sorry. If you could just remind me?

Mr. NADLER. Essentially that the NextWave investors are getting a lot of money out of this for people who filed for bankruptcy, defaulted and didn't complete the buildout.

Mr. VERRILLI. Well, the facts are, as I tried to set them forth in my statement, NextWave was ready in 1997 to build its network and tried to do so. It got caught in forces beyond its control. When the situation improved so that NextWave was in a position to raise financing again in January of 2000, it was ready, willing, and able to try again then. The FCC said no.

We are ready, willing, and able to try now if we have to. But, on balance, the board made the decision that the right thing to do is to take this settlement and to move on.

Mr. NADLER. Thank you, Mr. Chairman. Can I have unanimous consent for an additional minute, please?

Mr. BARR. The gentleman from New York is recognized for 1 additional minute.

Mr. NADLER. Thank you.

Mr. Roberts, you stated that essentially this settlement doesn't treat other companies such as yours who play by the rules, as you say, fairly. Assuming for the sake of argument that this settlement is the best, most efficient, and cheapest way of getting the Government—is the cheapest way of getting the Government off the hook for what it is on the hook for, because of what happened, how if it all—what should this Committee do, in your opinion, to make things fair for other small companies, such as your own?

Mr. ROBERTS. Well, Congressman, if the Congress decides to pass any of these settlement proposals, I think what the Congress should do is try to put the 75 to 80 folks out of the 89 bidders, the 75 to 80 folks who played by the rules, as close to back in the original situation as possible.

There are two things that can be done for that. First of all, rather than paying NextWave \$9.55 billion, they can only pay NextWave \$8.55 billion, which lowers them from 20 times to 18. They could simply take \$1 billion out of the amount that they are going to pay NextWave and allocate it, pro rata, to the folks who played by the rules in recognition of the money they lost and the opportunity costs that, in fact, my colleague so eloquently talked about, opportunity costs.

The second thing they can do is to allocate \$3 billion dollars in bidding credits to these same folks.

Mr. NADLER. Bidding credits? You mean for the next auction?

Mr. ROBERTS. For auctions in the future. And if QUALCOMM, who is a big shareholder of NextWave, got about \$120-some-odd million in bidding credit back in Auction 5, that would, I think, put the folks who played by the rules back in the shape they could have been in had this auction not turned into a disaster based on the actions of NextWave.

Mr. BARR. The time of the gentleman from New York has expired. Did you conclude your answer?

Mr. ROBERTS. Yes, sir.

Mr. BARR. The Chair recognizes the distinguished former Chairman on the Subcommittee on Commercial and Administrative Law and the current Chairman of the Subcommittee on Immigration and Claims, Mr. Gekas, for 5 minutes.

Mr. GEKAS. Yes, thank you. Mr. Roberts, in your statement you made reference to the fact that your company, among other companies, played by the rules when you chose to return the licenses; is that correct? Is that what you meant by that?

Mr. ROBERTS. That is correct. The FCC had given three options.

Mr. GEKAS. The indication in your statement and actually what you said overtly is that NextWave did not play by the rules, because they chose to go bankrupt?

Mr. ROBERTS. The FCC—

Mr. GEKAS. Isn't it possible that your company could have declared bankruptcy?

Mr. ROBERTS. Not within the conditions that the FCC set out. The FCC said three things to us and all similarly situated folks. They said, turn in your licenses and lose your down payment; turn in half your license and lose half of your down payment; or pay up. And we took our regulator at their word.

Mr. GEKAS. Didn't they say the same thing to NextWave?

Mr. ROBERTS. I suppose they did. But then NextWave simply decided that they weren't going to pay.

Mr. GEKAS. So what I am saying to you is that NextWave, on the one hand, and the other companies that—of which you were one—all had these three options that you are talking about. So under your description of playing by the rules was to succumb to the options given to you by FCC; is that correct?

But you say it is not playing by the rules when NextWave, in looking at those options granted by the FCC, chose a legal option to declare bankruptcy. You say that that is not playing by the rules?

Mr. ROBERTS. Congressman, I say that when a company says—essentially thumbs its nose at its regulator and turns around and gets paid off \$9.55 by the regulator, that seems to me that it is not playing by the rules.

Mr. GEKAS. At the time that the election was made by your company to opt for number 3, to return the license, that was done outside of court; is that correct? I mean, that was done by whim—not whim, by decision of your board; is that correct?

Mr. ROBERTS. We looked at the financial arena out there. And because NextWave, of course, is—as they say, NextWave had bid huge amounts for these licenses. That had essentially sucked all of the financing out of the system to build cellular phone companies at that time. So we looked at that and we said, these are the three options that our regulator has given us. We will take turning them in.

Mr. GEKAS. Were you ever advised by your counsel or by external entities that another option you had was to declare bankruptcy?

Mr. ROBERTS. We simply read the FCC rules, sir. We are small businesses and we were not—no. I mean, it didn't occur to us to take some other option other than that which the regulator had outlined.

Mr. GEKAS. Well, do you believe that your counsel would have declared to you that going bankrupt was not playing by the rules?

Mr. ROBERTS. I don't know what our counsel, sir, would have declared to us, because we didn't do that. We adhered to the conditions.

Mr. GEKAS. I have no further questions.

Mr. BARR. The Chair will declare a recess until 10 minutes to noon. We have—I would advise Members that I have been informed that we have a 15-minute followed by a 5-minute vote. This will give the witnesses a chance to relax for a few minutes also. So we will recess and reconvene at 11:50.

[Recess.]

Mr. BARR. The hearing will reconvene.

The Chair is pleased to recognize the gentleman from Virginia, Mr. Boucher, for 5 minutes.

Mr. BOUCHER. Thank you very much, Mr. Chairman. Let me say at the outset that I believe this settlement to be broadly in the public interest, and I want to compliment the various parties that have participated in the negotiation of the settlement.

From the standpoint of the Government, it is clear that the public Treasury will be advanced, the Government will receive more

than \$5 billion more than it would have gotten from the original auction. In addition to that, the public interest is served by virtue of the fact that this spectrum will immediately be put to use and will be available for wireless, voice, and data traffic.

So it appears to me to be a very good resolution to a legal quagmire, and I again want to compliment the parties who negotiated it.

You all heard the statements of Mr. Conyers earlier today. That presented what I think is a real problem. And I agree with his analysis; that is, that in the 10 days or 2 weeks that we have remaining in this session of Congress, it is going to be difficult at best, in order to have legislation originate and pass both houses that would ratify this settlement. And I think we confront the very real prospect that that may not happen.

And so the question that I have to this panel is: First of all, why does Congress have to be involved at all? You basically had the parties around the table. Why isn't a settlement that is signed onto by these parties sufficient in and of itself? Why does Congress have to be involved?

And the corollary to that question, which I will also pose and simply ask this panel to respond to is: What is going to happen if Congress, as is possibly the case, does not act, does not pass the legislation that you are seeking? What then happens? What are the events from that time forward?

Mr. Bybee, Mr. Rogovin, whoever would like to respond, I would be glad to recognize you. Mr. Bybee.

Mr. BYBEE. Thank you, Mr. Boucher. Let me take your first question as to why Congress is being asked to act, and let me defer first to Mr. Hunt on what happens in the event that Congress does not act.

On the first question, let me be very brief. We are asking Congress to act here for basically three reasons:

First of all, we need an appropriation. Ordinarily the Department of Justice can settle litigation under the judgment fund when there is a monetary claim against the United States. Ordinarily the United States can—the Department of Justice can—has authorization to settle matters under the judgment fund if there is a monetary claim against the United States. There is no claim against the United States that would permit us or the FCC to settle this case without a congressional appropriation. A Congressional appropriation first—an easy one—we have to have that from Congress.

Secondly, we really need Congress to provide for expedited review. That will make these licenses available more quickly and gets us into the system, makes the settlement work.

Mr. BOUCHER. Well, on that point, Mr. Bybee, let me ask you this. A lot of parties participated in drafting this settlement. They have signed off on it. Presumably those parties are not going to contest the settlement in court. And so who is the party that you think is likely to go to court and challenge this settlement, and what party would have standing to do that?

Mr. BYBEE. Let me defer both that question to Mr. Hunt and the question of what happens in the event that Congress does not approve the settlement.

Mr. HUNT. Congressman Boucher, I think the answer to the question of what happens if Congress does not enact this, I want to make clear that we have not presented this to Congress in an effort to have Congress abrogate its responsibility here to look at this. There has been some tenor here—

Mr. BOUCHER. Well, let me say that I am not suggesting that in Congress, acting on this quickly, we would abrogate anything. That is not my position. I am just asking a basic question. That is, why do we have to act at all, and what happens if we don't?

Mr. HUNT. There are several reasons why we think it is important for Congress and necessary for Congress to act at all. One is the appropriation. There is no way for the FCC to get the licenses back from NextWave if there is not a guarantee that NextWave will receive payment. NextWave will not relinquish its claims to those licenses. And if the FCC does not have clean licenses, they are not able to put those licenses or grant them to the Auction 35 participants.

So that is why the appropriation is needed. There is no other fund, as Mr. Bybee indicated. The judgment fund would not be available as a source here.

The other is because—and ties into the question of why we need it—would need to do this by December 31 of this year.

Mr. BOUCHER. Well, let's get to the question of expedited review first, and answer my question, if you would. With all of those various parties having signed the settlement, we can presume they are not going to challenge it, and so who would have standing to challenge this in court? Why do we have to provide expedited review?

Mr. HUNT. We are not aware, Congressman, of any party that has a meritorious claim. We cannot think of a party that has a valid claim. It doesn't mean that perhaps El Dorado, who you have heard from today, would not seek to present a claim and perhaps have standing to do so. But we don't think the claim would be meritorious, and we don't think it would succeed. But, in order to resolve this expeditiously and enable the FCC to get the spectrum into public use, all of the parties felt it was necessary to have the expedited judicial review provisions in order to end this litigation and get the spectrum into use in 2002. So those were the reasons for—those are the principal reasons.

There is one other reason why the legislation is necessary, and that would be to close any question about the FCC's authority to deploy the spectrum in the manner contemplated by this agreement. Congress, of course, has the authority to deploy the spectrum and, by authorizing and approving this settlement, would be eliminating any statutory challenge.

Mr. BOUCHER. Now, what about the December 31—

Mr. BARR. Does the gentleman request an additional minute?

Mr. BOUCHER. Mr. Chairman, may I have 1 additional minute, please?

Mr. BARR. The gentleman is recognized for 1 additional mind.

Mr. BOUCHER. What about the December 31 deadline that you have suggested? Why is that a real deadline? What happens if this goes beyond December 31?

Mr. HUNT. The reason for the December 31 deadline is in order for the clock to start ticking on all of the judicial review that must

happen in order for the spectrum to be put into use in the year 2002. If this legislation is not enacted by December 31, 2002, there is no agreement—sorry, 2001.

If this agreement is not enacted by December 31, 2001, there is no agreement. So what would happen at that point would be the parties would be forced back to the table to see if they could get a resolution. It may be that the parties are unwilling again to try to do that because it is unclear and doubtful that we would be able to end the litigation and put the spectrum into public use in the year 2002.

Mr. BOUCHER. Well, thank you very much for your answers. I appreciate that. Thank you for your indulgence, Mr. Chairman.

Mr. BARR. Thank you. The Chair recognizes the gentleman from Utah, Mr. Cannon, for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman.

Mr. Roberts, just a follow-up on what I think Chairman Gekas was getting at earlier. Are you planning to sue your lawyers for malpractice here?

Mr. ROBERTS. Sir—

Mr. CANNON. I am glad that you laughed at that because it is funny; but it is dang serious when you get down to what is the core issue.

Mr. ROBERTS. Sir, our issue is with the Auction 5 participants like us who played by—who accorded themselves and played with the FCC's conditions. That is—it seems to us to be manifestly unfair to have—

Mr. CANNON. It seems to me that you guys are missing out on—considering the money that actually was at risk here, you are missing out on like a 200-to-1 return.

I mean, it seems to me that someone has got a problem. It is either your lawyers who you are going to sue for malpractice, or somehow—Mr. Rogovin, you may want to address this—we have a system that is now going to be held up by lawyers who believe that they have to advise their clients to jerk you guys around pretty badly to beat you up with the bankruptcy courts.

Mr. ROGOVIN. Congressman Cannon, the El Dorado firm made a decision under the restructuring order, and it was a business choice that they made. And they made that choice under a restructuring order that was affirmed by the D.C. Circuit. With due respect to El Dorado, I think they should rest on the business choice that they made. They were not a party to any of the proceedings.

Mr. CANNON. But my point is a little different. My concern about this thing, I think you will concur that other people have been expressing is, what happens to the system if we let a grotesque profit—these are profits that make the dot-com boom look silly, you know, but we don't have anything to deflate them here, because we are holding up spectrum as the Justice Department is suggesting here.

In other words, we don't get this in the system unless we pay this exorbitant fee to these guys. Isn't this a problem for how we operate in future auctions?

Mr. ROGOVIN. Congressman, I think a central part of the reason why the numbers got so big is that the price of spectrum goes up

and down. And that is what we have seen throughout the NextWave litigation.

Mr. CANNON. And right now you have the price of spectrum way up because Verizon needs spectrum, and if we don't get spectrum out there to Verizon soon, they are going to have a serious problem in meeting their business potential, and frankly a whole lot of people who want to use telephones, wireless phones, are not going to be able to use them.

Mr. ROGOVIN. That is very much a goal of this, the Chairman and the Commission, to get these licenses out as quickly as possible so that the real winner here is the American consumer.

Mr. CANNON. Someone is paying a ton of money and a ton of money is going to the NextWave investors, a big chunk of money. What is wrong with doing what—in fact, let me just address this, Mr. Verrilli, to you.

What is wrong with doing what Mr. Roberts suggested? Why not make a deal with him? We have got billions here to play with. Why not put a billion aside for these guys who played by the rules?

Mr. VERRILLI. Well, with all due respect, Congressman Cannon—

Mr. CANNON. You guys have the lock on this thing.

Mr. VERRILLI. NextWave played by the rules, and has always played by the rules.

Mr. CANNON. Let's don't get in an argument about the rules here. The question is, you got such a large amount of money; why shouldn't you split it up?

Mr. VERRILLI. This was a settlement entered into to resolve litigation.

Mr. CANNON. Right. You guys are in a great position because we are not going to—the Chairman's goal of the FCC is to get this spectrum out in the public, and we are paying, what, \$5 or \$9 billion extra for that. That is either going to be taxpayers or it is going to be rate users who are going to be paying that. Why not split up the largesse?

Mr. VERRILLI. Congressman Cannon, the way this settlement will work as a result of the settlement, the United States Government will end up with much, much more in the way of revenue than if NextWave retained their licenses.

Mr. CANNON. I think we all understand the numbers. The United States will not end up with nearly as much revenue as if they re-auctioned these and get the revenue for the taxpayer of America.

So let me just shift gears. With all of this money on the table, I understand that you may not be able to get this spectrum out by the end of 2002 unless we do this extortionist deal. I mean, I understand that. But why do we have to do it by December 31? If this deal is so good for everybody, why can't we look at it for a little while? We are talking about a ton of money. We are talking huge policy. We are talking about the stability of, I think, not just our FCC auctions, but auctions all over the country.

And let me start—Jay, it is really nice to have you here; my classmate, does my law school proud, I might point out.

Why don't we start as a matter of policy, Jay, and talk about what this does policywise; and then, Mr. Rogovin, if you want to address that, I would like to hear that.

Mr. BYBEE. I want to give Mr. Hunt a chance to address this as well. But let me just answer quickly that there are always litigation risks. And all of the parties have to compromise somewhat if we want to have a settlement. It will expedite the resolution of this. It gets the spectrum into the market, and everybody is going to have to give.

It is always a cost of settling litigation. Let me ask—let Jody address that.

Mr. HUNT. If I might just add to that, Congressman. There has been some suggestion here that the taxpayer is being put out because we are going to have to pay money to NextWave.

I want to make clear that it is our view, having lived with this and litigated it, and being aware of all of the factors and circumstances, that we think we are here not to present a problem to Congress, but to present something that is good, and good for the American public, because not only will we be making that payment but we will be, after making that payment, receiving billions of dollars into the Treasury that we otherwise wouldn't see.

If we don't succeed—

Mr. CANNON. Reclaiming my time. Those are really not the questions. You are not here to convince us—we have looked at the documents. You don't have to convince me of what is good or bad. Personally I think it is very important that we get that spectrum out there. I am concerned about the more fundamental issues of what we are doing to our structure and our system by caving into extortion when the market shifts against us as the price of bandwidth goes up or down or the spectrum goes up and down.

When it goes up, we are subject to extortion. That is what we are talking about doing here, it seems to me. So pardon me, Mr. Rogovin, if you want to just address that, I would appreciate it.

Mr. BARR. The witness will certainly have time to answer the question. And then the gentleman's time has expired.

Mr. ROGOVIN. The decision, as in many litigations when there is an adverse decision, is to decide whether to pursue litigation or to pursue settlement. And we have chosen not only to file a cert petition if case settlement doesn't work, but to explore settlement.

And from the Chairman's perspective, from the Justice Department's perspective, the settlement agreement that we did reach, to our mind, was preferable; and it is now for Congress to decide. And we defer to you and understand the decision that you need to make. And we hope that you will agree with us, and we will be disappointed if you don't.

But I think it is only fair and only makes sense, given the nature of this issue, for Congress to be doing exactly what it is doing, which is to be holding this hearing that Chairman Barr has convened and for you all to exercise your judgment.

Mr. BARR. Thank you. The Chair is pleased to recognize the gentlelady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I am very appreciative for this hearing. Let me just say that I never like to be put into a position to have to make a decision at the last minute without the benefit of having been involved earlier, or even asked to participate in some form.

Did anybody participate with the Members of Congress at the point that you turned down the offer for settlement from this company? And why did you turn down NextWave's offer for \$4.2 billion when they offered to settle?

Mr. ROGOVIN. Congresswoman Waters, I believe that decision was made at the time—and I might add, at a time when I was not at the Commission. But my understanding is that the decision was made on the strength of the Second Circuit's rulings, and the theory was that licenses had automatically canceled.

Ms. WATERS. So you weren't there. But it seems to me that when a decision like that is made, and Congress may have to do the appropriation later on if you aren't successful, then someone ought to contact someone and start to talk about this early on. And I guess we will never get the benefit of all of the things that went into that.

Secondly, let me ask you about Urban Communications. Are you familiar with Urban Communications and the situation that they have that is so similar to NextWave?

Mr. ROGOVIN. Yes, I am.

Ms. WATERS. What are you doing about that?

Mr. ROGOVIN. I have met with them on several occasions, and met most recently with both UrbanCom officials as well as their outside counsel. I believe it was 2 days ago.

Ms. WATERS. What are you going to do?

Mr. ROGOVIN. What we have told UrbanCom is that we need to address the *NextWave* case first, because that is on the track in the litigation, where we need to make sure that we have settled that case before we can look at other cases and settle those cases.

Ms. WATERS. This seems to be exactly the same thing where Urban Communications also had filed for bankruptcy. This seems absolutely the same case. And it seems to me that the court is saying to them that this is the same case, and giving you an opportunity to settle it while you are taking care of this. Why aren't you doing that?

Mr. ROBERTS. We recognize that Urban Comm is similar to the *NextWave* case, and we recognize that it may well be a prime candidate for settlement. The case is being handled by the Justice Department by the southern district litigators in New York, and before we could take the step to settle the case, we would certainly need the approval of the Justice Department. But I recognize that, Congressman Waters—

Ms. WATERS. Justice Department, you know about this case?

Mr. HUNT. Yes, Congresswoman.

Ms. WATERS. What are you doing about it?

Mr. HUNT. Well, I understand that we are in discussions. I have not personally been involved in those discussions.

Ms. WATERS. Where is the person who is involved?

Mr. HUNT. Actually one of them is seated behind me.

Ms. WATERS. Get him up here. It doesn't make good sense for you to be here with the exact same case.

Mr. BARR. We do have regular order here. Is the gentlelady making a request that an additional person—

Ms. WATERS. Yes, in a very abbreviated way. You are right. The gentleman is correct, we should respectfully request that the per-

son who knows something about this join us to help us shed some light on it.

Mr. HUNT. If I might just add before we do that—

Mr. BARR. The Chair will decide if we will do that, but you may proceed.

Mr. HUNT. Thank you. Sorry if I misspoke.

I understand that there is a difference that while they are in bankruptcy in the southern district of New York, Urban Com, that there is no pending regulatory action as NextWave had in the D.C. Circuit. That puts them in a little bit of a different posture. But there is nothing about this agreement that—or the proposed legislation that precludes us from entering into a settlement with Urban Com.

Ms. WATERS. Let me just say this. Since the case is exactly the same, it seems to me that instead of making the same mistake that has been made before and then coming back here after the fact asking us to appropriate money in order to settle, you ought to be trying to get rid of this at the same time. I am not so sure—and, Mr. Chairman, let me just say this, I don't know where we will enter this, and I certainly hope that we don't—this won't be resolved by the 31st, I don't think. But I would like to see Congress take ahold of this whole thing and do several things.

One, Mr. Roberts, I think you are absolutely right. I think you did play by the rules, and I think that you have been screwed, I really do. I don't care what Mr. Verrilli says, that which is framed by the FCC about how this works. Nobody anticipated bankruptcy as a way by which someone would not have to honor the fact that they came in and bid this thing way up, maybe above and beyond their ability to pay. But that is not good intent when you do that. I have some questions about intent when you bid that high and you don't get anywhere near paying the amount of money that you bid.

Now, having said all of that, it is my greatest wish that Congress take ahold of this whole thing, and that we put Urban Communications in for settlement, and that we take care of those small businesses that were in auction block 5 and make them whole. That is my wish. I don't know if that is what is going to happen, but as I work with this, I am going to say to my colleagues here that I think that is the only fair thing to do. I am not against NewWave getting a settlement of some kind, but I am against the other entities that are involved in this being ignored in the way they appear to be being ignored. And I think while we are working on the whole thing, we may as well take care of everybody.

Mr. ROBERTS. Congresswoman, may I add something?

Ms. WATERS. I don't know. My time is up. You have to ask him.

Mr. BARR. Mr. Roberts, you may conclude your thought.

Mr. ROBERTS. In fact, the FCC itself has said, and I quote, "it would be unfair to permit a licensee that could not satisfy its bid to file for bankruptcy, tying up the spectrum in the process, and then emerge from bankruptcy at some later time and retain the licenses while others that complied with our rules lost their licenses." This is what the FCC said.

Ms. WATERS. I absolutely 100 percent agree.

Mr. BARR. The time of the gentlelady has expired. Thank you, ma'am.

We appreciate very much the witnesses being here today. We appreciate the Members of both Subcommittees here today. We appreciate Mr. Bryant's time being with us today and his contribution.

The record will remain open for 7 days for any additional materials that either Members or witnesses wish to present and make a part of the record.

Mr. BARR. And with that, the——

Ms. WATERS. Mr. Chairman.

Mr. WATT. I ask unanimous consent to submit for the record a letter dated November 21 from the attorneys for Urban Communications—Communicators.

Mr. BARR. Without objection.

[The information referred to follows:]

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November 21, 2001

**VIA FACSIMILE**

The Honorable Thomas A. Daschle  
Majority Leader  
U.S. Senate  
U.S. Capitol, S-221  
Washington, D.C. 20510

The Honorable J. Dennis Hastert  
Speaker  
U.S. House of Representatives  
U.S. Capitol, H-232  
Washington, D.C. 20515

Re: NextWave Settlement Legislation

Dear Majority Leader Daschle and Speaker Hastert:

Urban Communicators PCS Limited Partnership ("Urban Comm") is greatly concerned about press reports which indicate that the Congress is planning to pass special legislation which will provide the authority and basis for settlement of litigation between NextWave Power Partners Inc. and NextWave Personal Communications Inc. ("NextWave") and the Federal Communications Commission ("FCC"), but, which legislation will not be broad enough in its scope to include the settlement of similar litigation between Urban Comm and the FCC. Urban Comm requests, for the reasons set forth below, that any legislation passed by the Congress to facilitate the settlement of the NextWave litigation also be broad enough to facilitate the settlement of the Urban Comm litigation with the FCC.

Urban Comm, like NextWave, was a successful bidder for broadband personal communications services ("PCS") spectrum and acquired PCS licenses in the FCC's C-Block and F-Block PCS auctions in 1996, participating in the same FCC auctions in which NextWave participated. Like NextWave, Urban Comm was unsuccessful in completing the financing necessary to construct its wireless communications system within the time and payment constraints imposed by the FCC, and was forced to file for protection under Chapter 11 of the Bankruptcy Code to reorganize and to preserve its PCS licenses. Urban Comm has been in Chapter 11 reorganization

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since October 28, 1998, and, like NextWave, has been in litigation with the FCC since shortly after that date.

Urban Comm commenced an adversary proceeding in the Bankruptcy Court to avoid, as a fraudulent conveyance, Urban Comm's obligations under the Notes Urban Comm executed as part of the security demanded by the FCC to secure Urban Comm's obligation to pay the bid price for the PCS licenses. The FCC moved in the Bankruptcy Court to withdraw the reference of the adversary proceeding to the District Court, which motion was denied by the United States District Court for the Southern District of New York.

Thereafter, the FCC moved to dismiss the complaint in the adversary proceeding, the decision on which motion has been reserved by the Bankruptcy Court pending a resolution of identical litigation regarding NextWave. The Bankruptcy Court's position is that it would be a waste of judicial resources to litigate the same issues in the same forum as NextWave's Chapter 11 case, as the Chapter 11 cases of NextWave and Urban Comm are so similar that a decision involving one would equally apply to the other.

Now, the FCC has announced a settlement of the NextWave litigation, and has asked Congress to enact legislation enabling the settlement. However, the enabling legislation is drafted so narrowly that Urban Comm, a debtor similarly situated to NextWave, is not covered by the umbrella of the proposed legislation.

In the context of the issues raised by the NextWave bankruptcy, Urban Comm is a very small company. NextWave owes the FCC about \$4.7 billion in principal for its licenses, while Urban Comm owes the FCC about \$75 million in principal for its licenses, approximately 1.6% of the amount owed by NextWave.

Urban Comm has sought to negotiate a settlement of its adversary proceeding with the FCC since its inception in 1998. However, every effort to negotiate a settlement with the FCC has been rebuffed with the same mantra, "We can't settle with you until we settle with NextWave." Just last month, officers of Urban Comm traveled to the FCC's headquarters to meet with FCC and Department of Justice officials to discuss the inclusion of Urban Comm in any potential settlement with NextWave, but were again told that a settlement with NextWave would have to be concluded before any settlement discussions would be held with Urban Comm. As the press reports and rumors of a possible settlement with NextWave increased over the past few weeks, communication with the FCC decreased dramatically. The FCC has now announced a settlement with NextWave, but the FCC continues its refusal to discuss settlement with Urban Comm.

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The Honorable Thomas A. Daschle  
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Thus, Urban Comm now finds itself in the untenable position of watching the FCC propose a settlement to Congress which would create special legislation to settle the NextWave litigation, while settlement with Urban Comm will be excluded from such legislation. Urban Comm has license debt of only 1.6% of the amount owed by NextWave, yet, if Urban Comm is excluded from settlement legislation, Urban Comm will be forced to continue its litigation against the FCC to resolve its Chapter 11 reorganization, even though the FCC has conceded that such continued litigation is not a reasonable use of resources with respect to the NextWave litigation.

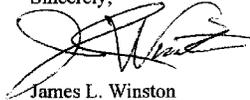
Such a result is clearly not in the public interest, is unfair to Urban Comm and reflects a clear abuse of discretion on the part of the FCC. A settlement of the NextWave litigation is appropriate, because the FCC's C-Block and F-Block PCS auctions were a failed experiment. The FCC experimented with a number of ill conceived ideas in that auction -- such as establishing the FCC as the senior creditor -- and the winning C-Block and F-Block licensees were the unwitting guinea pigs in that failed experiment. A reasonable resolution of the pending litigation and Chapter 11 cases which provides an equitable resolution is good public policy, and the settlement terms between the FCC, NextWave and the various carriers is a reasonable resolution.

However, the proposal before the Congress, as drafted, is only a partial resolution of the C-Block and F-Block debacle. The resolution leaves Urban Comm's Chapter 11 case completely unresolved, and affords NextWave preferential treatment only because it's debt to the FCC is much greater than Urban Comm's. This is an unjust and illogical result.

Settlement of the C-Block and F-Block litigation is appropriate. It is not appropriate to provide a settlement mechanism for NextWave only. Urban Comm submits that any legislation passed by Congress should be broad enough to include a resolution of Urban Comm's Chapter 11 case as well as NextWave's.

Urban Comm requests a meeting with you to explain in greater detail the issues raised in this letter. We will contact your offices to arrange such a meeting.

Sincerely,



James L. Winston  
Counsel to Urban Communicators PCS  
Limited Partnership

JLW/kn

**RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, L.L.P.**

The Honorable Thomas A. Daschle  
The Honorable J. Dennis Hastert  
November 21, 2001  
Page Four

cc: The Honorable Ernest F. Hollings  
The Honorable John McCain  
The Honorable W.J. "Billy" Tauzin  
The Honorable John D. Dingell  
The Honorable Charles B. Rangel  
The Honorable Edolphus Towns  
The Honorable Michael K. Powell  
The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin

Mr. BARR. The gentelady from California.

Ms. WATERS. I was trying to get your attention for the same thing. The issue that I took up relative to Urban Communications, I want to submit for the record their letter that I think was just done by Mr. Watt. I want to make sure that is in the record.

Mr. BARR. That has been done without objection.

Again, we appreciate the witnesses being here for their expertise and background. And this hearing is adjourned.

[Whereupon, at 12:30 p.m., the Subcommittee was adjourned.]

# A P P E N D I X

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## MATERIAL SUBMITTED FOR THE HEARING RECORD



**U.S. Department of Justice**  
**Office of Legislative Affairs**

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Office of the Assistant Attorney General

Washington, D.C. 20530

December 18, 2001

The Honorable Bob Barr  
Chairman  
Subcommittee on Commercial and  
Administrative Law  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

During the hearing concerning the proposed NextWave settlement convened by the Subcommittee on Commercial and Administrative Law and the Subcommittee on Courts, the Internet and Intellectual Property of the House Judiciary Committee on December 6, 2001, Assistant Attorney General Jay Bybee was asked to supply additional information concerning statutory precedent for the legislation that the parties to the settlement have proposed to Congress. After the hearing, one additional question was submitted by a member of the Committee staff.

The questions and the Justice Department responses are attached. Please do not hesitate to contact us if we can provide further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Bryant", written over a horizontal line.

Daniel J. Bryant  
Assistant Attorney General

Enclosure

cc: The Honorable Melvin Watt  
Ranking Minority Member

AN IDENTICAL LETTER HAS BEEN SENT TO THE HONORABLE HOWARD COBLE,  
CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL  
PROPERTY

**DEPARTMENT OF JUSTICE RESPONSES TO REQUESTS FOR  
INFORMATION CONCERNING THE NEXTWAVE SETTLEMENT LEGISLATION**

**1. (By Representative Barr) Have there been other occasions on which Congress has been asked to enact, without amendment, legislation needed to implement a proposed settlement between the government and private entities?**

The Department of Justice, while requesting that Congress consider enacting the proposed legislation in unamended form, has not suggested that Congress cannot consider a different course of action. In his letter transmitting the proposed legislation to Congress, the Attorney General explained that enactment of legislation different from the legislation proposed by the parties could result in termination of the agreement or in the withdrawal of some of the private parties. Section 24(d) of the Settlement Agreement, permits the parties to withdraw from the Agreement, resulting, in some circumstances, in complete termination, if Congress enacts legislation different from that agreed to by the parties. The Settlement Agreement, which is the product of a delicate balance among competing interests, reflects the parties' unwillingness to commit, in advance, to implementation of the Settlement Agreement within some different statutory framework that could alter the risks and benefits of the bargain. Because enactment of the legislation in its proposed form would reduce the risk that the benefits of the Settlement Agreement could be lost as a result of termination or withdrawals, the Attorney General recommended that Congress give careful consideration to enactment without revision. Neither the Attorney General's letter, nor any of the Department's subsequent communications with Congress concerning the proposed legislation, however, suggest that Congress cannot also consider enactment of revised legislation incorporating any changes that Congress deems appropriate.

We are not aware of any other bill, designed to implement a settlement between the government and private parties, that the Department of Justice has proposed to the Congress in precisely this fashion. But we have made analogous proposals. Before the Judgment Fund was made available for the payment of compromise settlements, for example, the Department of Justice routinely submitted proposed settlements with private parties to Congress in order to obtain the appropriations needed to implement those settlements. *See, e.g.,* S. Rep. No. 87-733 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2439, 2439-41 (finding that the then pending proposal to permit the payment of compromise settlements, as well as judgments, from the Judgment Fund would reduce legislative burdens associated with particular appropriations) (report on the Act of August 30, 1961, Pub. L. No. 87-187, 75 Stat. 415 (codified as amended at 28 U.S.C. § 2414 (Supp. II 1996) and 31 U.S.C. § 1302 (1994))). Presumably, any decision by Congress to appropriate an amount less than the figure agreed to by the parties would have risked undermining such a proposed settlement, although we are not aware of any case in which Congress took this approach.

The availability of the Judgment Fund statute has greatly reduced the need for legislation to effectuate settlements. Nevertheless, some settlements involving Indian tribes have still required congressional ratification. Ratification provisions include:

- Section 4 of the Santo Domingo Pueblo Claims Settlement Act of 2000, Pub. L. No. 106-425, 114 Stat. 1890, 1892 (codified at 25 U.S.C.A. § 1777b (West 2001)), expressly "approved and ratified" a Settlement Agreement entered into on May 26, 2000, by the Departments of Interior, Agriculture, and Justice and the Pueblo of Santo Domingo to resolve the Pueblo's title and trespass claims.
- Section 604 of the Torres-Martinez Desert Caluilla Indians Claims Settlement Act, Pub. L. No. 106-568, 114 Stat. 2906 (codified at 25 U.S.C.A. § 1778b (West 2001)), "approve[d], ratifie[d], and confirm[ed]" a settlement agreement resolving trespass claims brought by Indian tribes and tribal members against irrigation and water districts. This settlement act, like the NextWave Settlement Agreement, contains provisions designed to allow parties to review and reratify the settlement agreement in light of the legislation. Under section 611 of the Torres-Martinez Act, the central substantive provisions of the Act cannot take effect until the Tribe and the irrigation and water districts reapprove the settlement and agree to the Act, *id.* 114 Stat. at 2912.

In addition, we are aware of one recent statute that retroactively broadened a waiver of federal sovereign immunity in a manner that had the effect of enabling the Department of Justice to settle certain claims against the United States.

- Section § 741 of the Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-30 (1998) (codified at 7 U.S.C. § 2279 note (2000)), retroactively permitted tolling of the two-year limitations period for certain claims against the Department of Agriculture arising under the Equal Credit Opportunity Act. This relaxation of the limitations bar made it possible for the United States to settle a class action by black farmers who alleged that the Department of Agriculture had discriminated against them in the administration of farm credit programs. A consent decree resolving the class claims, which calls for payments to individual farmers out of the Judgment Fund, was approved in *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C.1999), *aff'd* 206 F.3d 1212 (D.C. Cir. 2000).

**2. (By Representative Coble) Has Congress previously enacted statutes to effectuate settlements that have included provisions for expedited judicial review?**

Section (c) of the proposed legislation seeks to expedite judicial review by precluding statutory challenges to FCC's approval and implementation of the settlement, limiting the period during which challenges may be filed, channeling disputes into the United States Court of Appeals for the District of Columbia Circuit, and expediting resolution of litigation in that court and in the Supreme Court. These provisions are needed to ensure satisfaction of the requirement of Auction 35 high bidders that all litigation concerning the validity of their licenses be resolved by the end of 2002. Although the proposed legislation calls upon the courts to expedite this litigation, the courts will set their own schedules, subject to an instruction that they act "with a view to deciding" any such cases within specified periods, "if practicable."

Congress has enacted a number of settlement statutes designed to speed judicial review by limiting the period during which challenges can be filed and limiting venue. Examples include the last five provisions listed in our answer to question 3 below. Congress has also enacted a number of statutes that go beyond provisions that call upon courts to expedite to the extent possible and set firm deadlines for judicial action. (Several such statutory deadlines are cited in *French v. Duckworth*, 178 F.3d 437, 450-51 (7th Cir. 1999) (Easterbrook, J., dissenting from denial of rehearing en banc), *merits opinion rev'd by Miller v. French*, 530 U.S. 327 (2000).) Although Congress has enacted numerous statutes containing expedited review provisions, we are unaware of any such provision that is specifically designed to effectuate a proposed settlement that requires rapid resolution of potential judicial challenges.

**3. (By Subcommittee Staff) Has Congress previously enacted statutes limiting the time for legal challenges to agency and congressional action?**

Section (c)(1) of the proposed legislation requires prompt filing of any challenge to the legality of a decision on NextWave's bankruptcy settlement motion, or to the constitutionality of settlement legislation or of an FCC order implementing the Settlement Agreement.

Congress has established strict deadlines for the filing of challenges to new legal standards and determinations, even in circumstances where such new standards or determinations can significantly affect the rights of a broad class of parties with no necessary knowledge of the change. Examples include:

- Section 401(c), of the United States Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851, 1878 (codified as amended at 19 U.S.C. § 1516a(g)(4)(C) (1994)), requires that actions challenging the constitutionality of certain binational dispute resolution procedures and of certain actions be "commenced within 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed."
- Section 203 of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, 31 (formerly codified at 50 U.S.C. app. § 923 (1946)), required persons subject to wartime price control regulations to raise any objections to such regulations within 60 days of promulgation. In *Yakus v. United States*, 321 U.S. 414 (1944), the Supreme Court held that the failure of regulated parties to mount a timely challenge to a price control regulation in accordance with this prescribed procedure barred them from attacking the validity of the regulation in subsequent prosecutions.

Congress has also established very short deadlines for the initiation of challenges in circumstances where all parties with significant interests to protect are active participants in related proceedings prior to the event that triggers the limitations period. Examples include

- Section 104(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 341 (codified as amended at 28 U.S.C. §

158(c)(2) (1994)), provides that "[a]n appeal under [section 158(a) or (b) of title 28] shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules." Rule 8002(a), in turn, provides that such a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." In *In re Delta Engineering Intern., Inc.*, 270 F.3d 584, 586 (2001), the United States Court of Appeals for the Eighth Circuit summarily rejected an assertion that this statute's jurisdictional preclusion of appeals brought more than ten days after the entry of judgment by the Bankruptcy Court violated due process.

- The Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)(1) (1994)), allowed parties to certain proceedings before federal magistrates ten days to serve a district court with written objections to a magistrate's proposed findings and recommendations. In *Thomas v. Arn*, 474 U.S. 140, 156 (1985), the Supreme Court held that due process does not prevent a court of appeals from exercising its supervisory powers to treat the failure to file timely such objections as a waiver of those objections in any subsequent appeal from the district court decision.

In addition, in legislation designed to effectuate settlements of disputes involving tribal and individual claims to Indian lands and to Indian compensation funds, Congress has imposed special time limits on the filing of constitutional challenges to those settlement statutes. Examples of such provisions include:

- Section 8(d) of the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998, Pub. L. No. 105-387, 112 Stat. 3471, 3475 (codified at 25 U.S.C. § 1300d-27(d) (Supp. IV 1998)), required that actions challenging the constitutionality of statutory provisions for the distribution of funds appropriated to compensate lineal descendants of members of certain forcibly relocated Indian tribes, be filed within one year of the enactment of those provisions respecting distribution.
- Section 10 of the Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. no. 103-377, 108 Stat. 3501, 3507 (codified at 25 U.S.C. § 1775h (1994)), required any action challenging the constitutionality of that Act to be filed in United States District Court for the Southern District of Connecticut within 180 days of enactment.
- Section 14 of the Hoopa-Yurok Settlement Act of 1988, Pub. L. No. 100-580, 102 Stat. 2924, 2936 (codified at 25 U.S.C. § 1300i-11(b) (1994)), established time limits on the filing of any claims that the Act, which partitioned a communal reservation in Northern California for the purpose of "resolv[ing] long standing litigation between the United States, the Hoopa Valley Tribe and a large number of individual Indians" (S. Rep. No. 100-564, at 1 (1988)), resulted in takings "under the fifth amendment of the United States Constitution," 102 Stat. at 2936.

Section 10(a) of the Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688, 696 (1971) (codified 43 U.S.C. § 1609(a) (1994)), provided that "any civil action to contest the authority of the United States to legislate on the subject matter or the legality of [the Act] shall be barred unless the complaint is filed within one year of December 18, 1971 . . . ." Congress stated that the Act was intended to meet an "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." *Id.* § 2(a) (codified at 43 U.S.C. § 1601(a) (1994)). In *Paul v. Andrus*, 639 F.2d 507 (1980), the United States Court of Appeals for the Ninth Circuit upheld this time limitation.

### P. SCHOENFELD ASSET MANAGEMENT LLC

1330 AVENUE OF THE AMERICAS, 34<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10019

PETER M. SCHOENFELD  
CHAIRMAN & CEO

December 12, 2001

The Honorable Bob Barr  
Chairman of the Subcommittee on Commercial  
and Administrative Law  
2138 Rayburn HOB  
Washington D.C. 20515-6216

Dear Chairman Barr:

We are writing to commend the committee for holding the hearing on the NextWave settlement agreement and to respectfully request that this letter outlining our views on the implementing legislation be included in the December 6 hearing record.

P. Schoenfeld Asset Management (PSAM) is an asset management firm acting as a fiduciary for pension funds and also investment managers for endowments, foundations and high net worth individuals. We own 1.5 million shares of NextWave Telecom Inc. on behalf of the investors.

We have been actively monitoring the proposed legislation that is intended to facilitate a settlement agreement between NextWave Telecom Inc., the Federal Communications Commission, and the various winning bidders from FCC wireless Auction 35, completed in January, 2001 (the enabling legislation). We understand that while many members support the enabling legislation, there are several members that have expressed their reservations towards passing the legislation this year, and would instead favor an extended review process, including hearings, that would commence in 2002. We believe that failure to pass the enabling legislation in the current Congressional session would be tantamount to killing the settlement agreement.

We believe that this settlement is in the public interest and comports with existing bankruptcy statutes, and our hope is that the enabling legislation will be passed in Congress to allow it to proceed. We are writing to express our support for such legislation, and to present our viewpoints as to why it would benefit the public. Our views are summarized below.

1. Chairman Powell has managed to reach an agreement among 30 bidders, the FCC, and NextWave, while preserving the bids from Auction 35. We believe that the coalition is a fragile one, and if the agreement is not consummated by the end of the year, it will be terminated.
2. The settlement will allow the Treasury to reap substantial proceeds, approximately twice what it had expected to realize in the original C block auction. The government is receiving these additional proceeds in spite of existing bankruptcy statutes and the recent D.C. Circuit Appeals Court ruling on the case. As we will outline below, there are a number of scenarios by which these additional gains could disappear if the current settlement does not proceed.

3. The settlement puts this spectrum into the market more quickly than any other solution, something that will benefit all users of wireless service.

#### *I. Preserve the spectrum allocation from Auction 35*

Chairman Powell has certainly done an admirable job in managing a settlement, particularly considering that a coalition of the 30 bidders in Auction 35 and various government agencies needed to be assembled. We believe that as time goes on, the risk increases that the coalition of participants to Auction 35 will dissolve, and that this puts added urgency on completing this settlement. We believe this is the case because the values of wireless spectrum and of wireless communications companies have suffered large declines since the auction began one year ago.

To put this in context, the most recent comparable auctions are the European UMTS, or 3G auctions in that they were completed in 2000. Virtually all European wireless companies who have bought spectrum in the United Kingdom and Germany are undergoing "buyers remorse", as the investment community has placed lower and lower values on this spectrum. This remorse has grown to such an extent that Vivendi, a very well capitalized company with an equity capitalization of \$57.5 billion, informed the French government that it would not make an obligatory payment on the license it had purchased in a recent auction, simply out of protest against the price of the auction. As a result, the French Ministry of Finance has voluntarily reduced the costs of the licenses it previously sold by approximately 80%. There has been additional pressure on other European governments to take similar actions.

Despite the decline in wireless values, the buyers have stood by their bids. We believe that the main reason for this is that Chairman Powell was able to convince the bidders that the settlement was the quickest and easiest way for them to take title to the spectrum they purchased in Auction 35, and in their own minds, this offset the decline in the market value of the spectrum. We do not believe that all bidders will be willing to renew the agreement if it lapses, and that they will instead pursue other options. For example, with the wireless spectrum caps now lifted, wireless operators can entertain mergers that were impossible at the time of the auction, including with NextWave.

#### *II. Large Gain to the Treasury*

We understand that, on the surface, the settlement is disquieting because it will enable NextWave to achieve a large cash gain. We have also heard various arguments that this gain would be 'achieved at the expense of the American public'. We wish to comment on this impression.

First, the American public will still achieve a substantial gain from the settlement. It had expected to receive approximately \$5 billion from NextWave's participation in the original 1996 C block licenses. The proceeds were regarded as a windfall for the government; in fact prices were so high that they drove most of the buyers immediately into bankruptcy. (As evidence, the bids from the succeeding F block auction were a fraction of those achieved in the C block auction, and to a large degree made it very difficult for the C holders to obtain financing.) The FCC now stands to double those proceeds. This is in addition to a conservative estimate of \$1 billion in capital gains taxes that the Treasury would collect from NextWave shareholders.

A nullification of the settlement would leave NextWave in a position to be acquired in whole in a tax-free manner that will deprive the Treasury of in excess of \$5 billion. As we have discussed above, the raising of the spectrum caps has enabled consolidation in the wireless industry that was not available at the time of Auction 35. NextWave would be a very likely

candidate and we believe that a number of large carriers would be interested in acquiring it. The most likely form would be in a tax-free exchange of the acquirer's stock for NextWave as this would enable the acquirers to conserve capital and is the most tax-efficient solution for NextWave. Under such a structure, the acquirer could pay 30% less than was paid in the auction for NextWave's spectrum and NextWave would still net the same proceeds as is contemplated in the current settlement. The difference is that no capital gains taxes from NextWave or its investors would be collected by the Treasury.

### *III. Spectrum allocation benefits the wireless industry*

We also believe that the settlement serves the public interest because it is the quickest way to put much needed wireless spectrum into the marketplace. Wireless networks are getting more and more congested which has created service problems in many cities, including New York City and Washington D.C. If the settlement terminates, it would take a minimum of a year, if not several years, before this spectrum were put to use. With wireless usage expected to enjoy continued growth, this could pose additional harms to consumers.

Were NextWave to be eventually sold, it would take at least a year for an agreement to be negotiated, regulatory approvals obtained, and license transfers completed. Continuing litigation by the FCC could add to this schedule. NextWave has also publicly stated a desire to build out its network using the C block spectrum, but shelved this plan when the settlement was reached. Were the settlement to fall apart, we believe that NextWave will proceed with that plan. (The decision to settle with the FCC was in driven in large part by the concerns of the company's creditors, as well as the public shareholders, who have been uncomfortable with such a risk). Such a build-out would take several years to complete, and we also seriously question NextWave would make anywhere near as efficient use of this spectrum as the carriers that exist today would.

The settlement offers the best possible scenario for putting this spectrum to use in the hands of qualified operators who can deploy operations quickly.

### *Conclusion*

We appreciate your taking the time to consider our views. We would welcome the opportunity to further discuss them with you or your colleagues, and would gladly make ourselves available for any hearings that are held.

Very truly yours,



Peter M. Schoenfeld  
Chairman and CEO

cc: The Honorable James Sensenbrenner  
The Honorable John Conyers  
The Honorable Howard Berman  
The Honorable Melvin Watt

**EXECUTION COPY**

**SETTLEMENT AGREEMENT**

**BY AND AMONG**

**THE UNITED STATES OF AMERICA**

**THE FEDERAL COMMUNICATIONS COMMISSION**

**NEXTWAVE TELECOM INC. AND  
CERTAIN AFFILIATES**

**AND**

**PARTICIPATING AUCTION 35  
WINNING BIDDERS**

**November 15, 2001**

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**Schedules and Exhibits**

Schedule A: Winning Bidders  
 Schedule B: Notice Information  
 Schedule C1: Pending Matters  
 Schedule C2: Commission Filings

Exhibit A: Legislation  
 Exhibit B: Form of Letter of Credit  
     Annex A: Form of Draft  
     Annex B: Draw Certificate  
     Annex C: Certificate Regarding Termination of Letter of Credit  
     Annex D: Certificate Regarding Reduction of Letter of Credit Amount  
 Exhibit C: Closing Agreement on Final Determination Covering Specific Matters

**SETTLEMENT AGREEMENT**

This **SETTLEMENT AGREEMENT**, dated as of November 15, 2001, as amended from time to time (this "Agreement"), is entered into by and among NextWave Personal Communications Inc. and its affiliates, NextWave Telecom Inc., NextWave Partners Inc., NextWave Power Partners Inc., and NextWave Wireless Inc. (collectively, "NextWave"), the United States of America, and the Federal Communications Commission ("FCC" or "Commission"), and the Participating Auction 35 Winning Bidders (all of which, together with NextWave, the United States and the FCC, are collectively referred to in this Agreement as the "Parties" and each, individually, as a "Party").

**WITNESSETH:**

**WHEREAS**, the FCC granted to NextWave certain C Block and F Block licenses for which NextWave was the winning bidder at FCC auctions that concluded in 1996 and 1997;

**WHEREAS**, the status of the Designated Licenses has been contested in various pending judicial and administrative proceedings, including, but not limited to, NextWave Personal Communications, Inc., and NextWave Power Partners, Inc. v. Federal Communications Commission and the United States of America, D.C. Cir. Nos. 00-1402 and 00-1403, petitions for cert. filed, Nos. 01-653, et al. (Oct. 19, 2001), and In re NextWave Personal Communications, Inc., Bankr. S.D.N.Y. No. 98 B 21529 (collectively, the "Litigation");

**WHEREAS**, the Participating Auction 35 Winning Bidders placed winning bids for initial licenses to use the spectrum previously licensed to NextWave, and the United States and the Commission believe that the Participating Auction 35 Winning Bidders thereby incurred certain financial and other regulatory obligations subject to the outcome of the Litigation;

**WHEREAS**, the United States and the Commission believe that the best way to serve the public interest under the present circumstances is to resolve the Litigation as expeditiously as possible in the manner set forth herein, consistent with the Rules of the Commission and the law, and thereby avoid further delay in the use of the Covered Spectrum;

**WHEREAS**, NextWave seeks to resolve the Litigation as expeditiously as possible in order to complete the bankruptcy process in which it is engaged in a manner that best serves its corporate goals and the interests of its creditors;

**WHEREAS**, the Participating Auction 35 Winning Bidders seek to resolve the Litigation as expeditiously as possible so that Auction 35 can be implemented without the encumbrance of the Litigation, thereby facilitating and expediting the use of the Auction 35 Licenses that will be granted to them if qualified and in compliance with the Rules of the Commission; and

**WHEREAS**, all the Parties desire to effect NextWave's relinquishment of claims to the Covered Spectrum and the Designated Licenses so that the FCC may implement Auction 35 as specified in this Agreement and the Legislation.

**NOW THEREFORE**, in consideration of the mutual promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be bound, do hereby covenant and agree as follows:

**1. Definitions.**

As used herein, the following terms have the following meanings (unless otherwise indicated, all Section references are to Sections in this Agreement, and all Schedule and Exhibit references are to Schedules and Exhibits to this Agreement):

"Advance Tax Payment" has the meaning set forth in Section 4.

"Agreement" has the meaning set forth in the Preamble and in Section 32.

"Alaska" has the meaning set forth in Section 10.

"Alaska Letters of Credit" has the meaning set forth in Section 11.

"Alternative Security Arrangements" has the meaning set forth in Section 11.

"Amount Due on Receipt" means the amount equal to the balance due to the FCC, under the Rules of the Commission, as of the Payment Date for an Auction 35 License. The Amount Due on Receipt for an Auction 35 License does not include the Auction 35 Deposit for such License.

"Auction 35" means the FCC-conducted spectrum auction number 35 that commenced on December 12, 2000, for Personal Communications Services licenses to operate on Covered Spectrum and other spectrum.

"Auction 35 Deposit" means any monies on deposit with the FCC paid by a Participating Auction 35 Winning Bidder for an Auction 35 License. The Auction 35 Deposit for an Auction 35 License does not include the Amount Due on Receipt for such License.

"Auction 35 Licenses" or "Licenses" means those licenses to use Covered Spectrum for which Auction 35 Winning Bidders submitted winning bids in Auction 35.

"Auction 35 Winning Bidder" means those entities who submitted winning bids in Auction 35 for Covered Spectrum.

"Authorized Signatory" has the meaning set forth in Section 11.

"Bankruptcy Code" means Title 11 of the United States Code.

"Bankruptcy Proceedings" has the meaning set forth in Section 6.

"Bankruptcy Settlement Approval Order" has the meaning set forth in Section 3.

"Business Day" means any day, other than Saturday or Sunday, on which commercial banks in New York City and the Commission's offices are open for the general transaction of business.

"Cash Payment" has the meaning set forth in Section 4.

"Claims" has the meaning set forth in Section 22.

"Commission Order on Remand" has the meaning set forth in Section 16.

"Communications Act" means the Communications Act of 1934, as amended, which is codified in Title 47 of the United States Code.

"Covered Spectrum" means spectrum that NextWave had been authorized to use under the Designated Licenses.

"D.C. Circuit Proceedings" has the meaning set forth in Section 6.

"Deadline Date" means December 31, 2002.

"Department of the Treasury" has the meaning set forth in Section 4.

"Designated Licenses" means the C Block and F Block licenses for which NextWave was the winning bidder at auctions concluded in 1996 and 1997 by the Commission under Section 309(j) of the Communications Act.

"Disposition Order" means an FCC Order setting forth the Commission's determination as to the qualifications of a Participating Auction 35 Winning Bidder to hold any license offered in Auction 35.

"Disposition Order Cutoff Date" means the latest of:

(x) the Deadline Date; or

(y) in the event that the Final Bankruptcy Settlement Approval Date occurs after December 15, 2002 and on or before December 31, 2002, then January 15, 2003; or

(z) with respect to a Participating Auction 35 Winning Bidder, in the event that there is in effect on the Deadline Date a court order in a proceeding other than a proceeding under the exclusive review provisions of the Legislation that precludes or has the effect of precluding the FCC from issuing a Disposition Order, then January 15, 2003.

"Effective Date" means the first date on which the United States, the Commission, NextWave, Verizon and at least two (2) of the other Auction 35 Winning Bidders listed

on Schedule A have executed and delivered this Agreement. If the Effective Date has not occurred on or before January 10, 2002, then this Agreement shall be void *ab initio*.

"FCC" or "Commission" has the meaning set forth in the Preamble and includes any entity acting pursuant to delegated authority under the Rules of the Commission.

"FCC Implementing Orders" means the FCC Settlement Approval Order, the Disposition Orders, the Grant Orders and other FCC Orders that implement this Agreement.

"FCC Order" means any order, public notice, letter, or other form of FCC action.

"FCC Settlement Approval Order" means the FCC Order approving and adopting this Agreement.

"FRBP" has the meaning set forth in Section 3.

"Final" means, with respect to any order, that such order is noninterlocutory and has not been reversed, modified or stayed and (x) the time to appeal such order has expired and no appeal or petition for review, rehearing or certiorari is pending, or (y) any appeal has been fully decided and no further appeal or petition for review, rehearing or certiorari can be timely taken or granted.

"Final Bankruptcy Settlement Approval Date" means the first date on which all of the following conditions have been satisfied: (i) the Bankruptcy Settlement Approval Order has become Final; (ii) any litigation initiated by the filing of a petition seeking judicial review of the procedures provided by the Legislation for the resolution of issues presented by the Settlement Motion has been resolved by an order that has become Final; and (iii) either Verizon has caused Letters of Credit to be issued in accordance with Section 11, or Verizon has not caused such Letters of Credit to be issued and the United States has not, on or before January 29, 2002, exercised its consequent right to terminate the Agreement under Section 11(a)(iii).

"Grant Order" means an FCC Order determining that the Commission is prepared to grant an Auction 35 License upon timely payment and receipt of the Amount Due on Receipt.

"Invalidation Order" has the meaning set forth in Section 16.

"LC Provider" has the meaning set forth in Section 11.

"Legislation" means legislation precisely in the form of Exhibit A.

"Letters of Credit" has the meaning set forth in Section 11.

"Litigation" has the meaning set forth in the recitals.

"NextWave" has the meaning set forth in the Preamble.

"NextWave License Deposit" has the meaning set forth in Section 8.

"NextWave Payment" has the meaning set forth in Section 4.

"NextWave Payment Date" has the meaning set forth in Section 4.

"NextWave Upfront Payment" has the meaning set forth in Section 9.

"Participating Auction 35 Winning Bidder" means those winning bidders in Auction 35 whose winning bids relate in whole or in part to spectrum previously licensed to NextWave and that are listed on Schedule A attached hereto and that have executed and delivered this Agreement as of the date hereof, or hereafter pursuant to Section 27, and in either case, have not withdrawn as Parties pursuant to Section 24(d).

"Party" or "Parties" has the meaning set forth in the Preamble.

"Payment Certification" means a payment certification, complying with applicable Treasury regulations delivered to the United States Department of the Treasury, setting forth payment instructions to make the NextWave Payment in accordance with Section 4.

"Payment Date" has the meaning set forth in Section 16.

"Payment Notice" has the meaning set forth in Section 4.

"Relinquishment Date" has the meaning set forth in Section 4.

"Remand Order" has the meaning set forth in Section 16.

"Reversal Order" has the meaning set forth in Section 16.

"Rules of the Commission" means any and all rules, regulations, policies, procedures, public notices and orders of the FCC that are in effect at the time an action, event or matter in question occurs.

"Settlement Motion" has the meaning set forth in Section 3.

"Settlement Payments" has the meaning set forth in Section 9.

"Taxable Period" has the meaning set forth in Section 4.

"Terminating Bidder" has the meaning set forth in Section 24.

"Termination of Auction 35 License Obligations" means the cancellation and rescission of rights or obligations under Section 31(a)(iii), (b)(i), (c)(i) or (e)(i), or subparagraph (x) of Section 31(d).

"Total Tax Liability" has the meaning set forth in Section 4.

"True-Up Payment" has the meaning set forth in Section 9.

“United States” means the United States of America and any agency, department or instrumentality thereof.

“Verizon” has the meaning set forth in Section 10.

“Verizon Letters of Credit” has the meaning set forth in Section 11.

Whenever from the context it appears appropriate, each term stated in either the singular or plural shall include the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, the feminine and the neuter.

**2. Legislation.**

All non-governmental Parties agree among themselves that they shall cooperate to have the Legislation enacted into law no later than December 31, 2001. All non-governmental Parties agree among themselves not to advocate or seek the enactment of legislation covering the subject matter of this Agreement that varies in any material respect from the Legislation without the express written agreement of all of the non-governmental Parties.

**3. Approval by the Bankruptcy Court.**

Not later than fifteen (15) days after the Effective Date, NextWave shall file a Motion for Approval of a Compromise of a Controversy pursuant to Federal Rule of Bankruptcy Procedure (“FRBP”) 9019 (the “Settlement Motion”) in the Bankruptcy Proceedings seeking the entry of an order authorizing and directing NextWave to enter into the transactions contemplated in this Agreement on the terms set forth herein, to relinquish any and all claims to the Covered Spectrum and the Designated Licenses, and to return the Designated Licenses to the FCC in exchange for the payments referred to in Section 4 below (such order, the “Bankruptcy Settlement Approval Order”). NextWave agrees to seek the scheduling of a hearing on the Settlement Motion as soon as practicable, consistent with the Bankruptcy Code, after the enactment of the Legislation (but not before such enactment), and to file such other motions and to take such actions in the Bankruptcy Proceedings as may be necessary to effectuate this Agreement.

**4. Payment to NextWave.**

a. Conditioned upon (i) enactment of the Legislation, (ii) the occurrence of the Final Bankruptcy Settlement Approval Date, and (iii) NextWave’s simultaneous surrender and return of the Designated Licenses and its complete relinquishment of any and all claims related to the Covered Spectrum and the Designated Licenses as set forth in Section 6, and in consideration thereof, the FCC agrees to pay to or on behalf of NextWave as provided in subsections (b) and (c) below the sum of \$9.55 billion (the “NextWave Payment”), and (unless waived by NextWave) the FCC shall deliver a notice pursuant to I TFM 6-8535.20 (the “Payment Notice”) to the United States Department of the Treasury (“Department of the Treasury”) providing notice to the Department of the Treasury for making the NextWave Payment on December 31, 2002, unless payment is made earlier pursuant to subsection (b) below. Concurrent with its delivery of the Payment Notice to the Department of the Treasury, the FCC shall provide NextWave with notice confirming delivery of the same, and a copy of the Payment Notice. The effectiveness of

the Commission's obligation to make the NextWave Payment and its delivery of the Payment Notice and NextWave's surrender and return of the Designated Licenses together with the relinquishment of any and all claims to the Covered Spectrum and the Designated Licenses shall occur simultaneously on or before the tenth Business Day following the Final Bankruptcy Settlement Approval Date, but not later than December 31, 2002. In the event that the Final Bankruptcy Settlement Approval Date is after December 19, 2002, NextWave shall be deemed to have waived the requirement that the Commission deliver the Payment Notice for purposes of this Agreement, provided that such waiver shall not otherwise affect or modify any other term or condition of this Agreement, including, without limitation, the FCC's obligation to make the NextWave Payment in accordance with subsections 4(b) and 4(c). The date on which NextWave surrenders and returns the Designated Licenses and relinquishes its claims to the Covered Spectrum and the Designated Licenses, and the FCC delivers the Payment Notice to the Department of the Treasury (unless waived by NextWave), shall hereinafter be referred to as the "Relinquishment Date."

b. Upon the occurrence of the Relinquishment Date, the FCC will be obligated to make the NextWave Payment in the manner provided in subsection (c) below on the first to occur of the following (the "NextWave Payment Date"):

i. the fifteenth day following delivery to the Department of the Treasury of a Payment Certification which shall be made by the FCC no later than the seventh Business Day after the date on which the United States has received aggregate cash proceeds equal to or greater than \$9.55 billion from the payment by Participating Auction 35 Winning Bidders of Amounts Due on Receipt in respect of Auction 35 Licenses and the Auction 35 Deposits relating to such Licenses;

ii. the fifteenth day following delivery to the Department of the Treasury of a Payment Certification which shall be made by the FCC no later than the seventh Business Day after the date that an order is entered by any court in a proceeding under the exclusive review provisions of the Legislation that is Final, which precludes or has the legal effect of precluding the grant of the Auction 35 Licenses to the Auction 35 Winning Bidders; or

iii. December 31, 2002.

NextWave shall give all of the non-governmental Parties notice in accordance with Section 42 of its receipt of the Cash Payment.

c. On the NextWave Payment Date, and in satisfaction of the obligation described in subsection (a) of this Section 4, the United States will make a \$6.498 billion cash payment (the "Cash Payment") directly to NextWave, and will pay \$3.052 billion to the United States as a nonrefundable advance tax payment (the "Advance Tax Payment") on behalf of, and for the benefit of, NextWave for the tax period in which the Relinquishment Date occurs (the "Taxable Period"). This Advance Tax Payment shall be available toward satisfaction of the total federal income tax liability of NextWave with respect to the transaction that is the subject of this Agreement ("Total Tax Liability"). This Advance Tax Payment of \$3.052 billion can be used by NextWave only as a credit against its Total Tax Liability for the Taxable Period and not on a

subsequent claim for refund; and it cannot be carried forward or carried back to any other tax period and is not available for use or tax benefit in any year other than the Taxable Period. Notwithstanding any provision of law, NextWave agrees that the United States can retain all of NextWave's Advance Tax Payment, irrespective of NextWave's total federal income tax liability and any other payments NextWave is required to make to the United States pursuant to this Agreement or otherwise.

**5. Payment to NextWave Unaffected by Legal Challenges.**

Provided that the conditions set forth in Section 4(a) have been satisfied, and except as provided in Sections 4(b)(i) and (ii) and 24(a)(iii), neither the timing nor the amount of the NextWave Payment to NextWave pursuant to the spending authority provided by the Legislation shall be delayed or affected by any legal challenges related to the Legislation, and it shall not be delayed or affected by any legal challenges to the FCC's grant of any Auction 35 License.

**6. Surrender and Return of Designated Licenses and Release By NextWave.**

a. Within seven (7) days after the Effective Date, NextWave will file with the Commission an application for a non-substantial (pro forma) transfer of the Designated Licenses from NextWave Power Partners Inc. and NextWave Personal Communications Inc. to NextWave Telecom Inc. Upon receipt and acceptance of such application, the Commission shall reach a disposition as promptly as practicable. Neither the failure by the Commission to grant such an application nor the time by which the Commission disposes of such application shall affect the rights or obligations of the Parties under this Agreement.

b. Simultaneous with, and conditioned upon, the effectiveness of the Commission's obligation to make the NextWave Payment and its delivery of the Payment Notice to the Department of the Treasury (unless waived by NextWave), the Designated Licenses are surrendered and returned to the Commission, any and all of NextWave's rights and interest in and claims to the Covered Spectrum and the Designated Licenses are extinguished, and NextWave shall discontinue its pursuit of such rights, interest, claims and other rights with respect to the Covered Spectrum and the Designated Licenses in proceedings before the FCC and in any other proceedings, including without limitation, those taking place in Case Nos. 00-1402 and 00-1403 in the United States Court of Appeals for the District of Columbia Circuit, and any further proceedings arising therefrom (the "D.C. Circuit Proceedings"), and the Chapter 11 bankruptcy proceedings pending in Case No. 98 B 21529 in the Bankruptcy Court for the Southern District of New York and any further proceedings arising therefrom (the "Bankruptcy Proceedings"); provided, however, that nothing in this Section shall prevent NextWave from taking all actions necessary to complete the Bankruptcy Proceedings in the manner contemplated by this Agreement. The Parties acknowledge and agree that this Agreement and the occurrence of the Final Bankruptcy Settlement Approval Date are not related to or conditioned in any respect upon NextWave's ability to propose a bankruptcy plan and/or to have such a plan confirmed.

**7. Satisfaction by NextWave of Tax Liability.**

NextWave shall pay to the Internal Revenue Service its full and complete federal tax liability with respect to the transaction that is the subject of this Agreement. The Advance Tax Payment set forth in Section 4(c) shall be available toward satisfaction of NextWave's full and complete federal tax liability with respect to the transaction that is the subject of this Agreement. Nothing in this Agreement is to be construed as determining NextWave's federal tax liability for the Taxable Period or any other tax year, and nothing in this Agreement restricts the Internal Revenue Service's rights to determine NextWave's federal income tax liability for the Taxable Period or any other tax year. Payment of its full and complete federal tax liability shall not permit NextWave to avoid payment to the United States of any other amounts it is obligated to pay the United States pursuant to the terms of this Agreement or otherwise. Consistent with this Section, NextWave has entered into the "Closing Agreement on Final Determination Covering Specific Matters" that is attached hereto as Exhibit C. The United States and the FCC agree, in accordance with applicable laws and regulations, to maintain the confidentiality of any tax information provided to them, and NextWave agrees that the United States and the FCC may use and disclose such tax information as may be necessary to enforce this Agreement.

**8. Satisfaction of License Debt.**

On the Relinquishment Date, the United States and the Commission shall cancel all outstanding indebtedness of NextWave due the FCC (including any accrued interest and penalties) arising out of the Designated Licenses. In addition, as part of NextWave's full satisfaction of its debt, the Commission shall retain the \$499,004,905.33 in down payments that NextWave previously made on the Designated Licenses (the "NextWave License Deposit").

**9. Government Receipts from NextWave.**

**a. Upfront Payment.** In addition to the payments set forth in Sections 4(c), 7, 8, and 9(b) and (c), on the first Business Day after receipt of the Cash Payment, NextWave shall make a payment equal to \$30 million (the "NextWave Upfront Payment") to the Commission.

**b. Settlement Payments.** In addition to the payments set forth in Sections 4(c), 7, 8, and 9(a), after NextWave receives the Cash Payment, and on the first Business Day after the filing of NextWave's federal income tax return for the Taxable Period, NextWave shall make a payment to the Commission equal to \$150 million (the "True-Up Payment"), subject to adjustment as set forth below in this subsection. To the extent that the True-Up Payment, the NextWave License Deposit, the NextWave Upfront Payment, and the greater of the Advance Tax Payment and the Total Tax Liability (collectively, the "Settlement Payments") are less than \$3.731 billion, NextWave shall increase the True-Up Payment to the Commission so that the Settlement Payments equal \$3.731 billion. Similarly, to the extent that the Settlement Payments exceed \$3.731 billion, NextWave shall reduce the True-Up Payment so that the Settlement Payments equal \$3.731 billion. If the NextWave License Deposit, the NextWave Upfront Payment, and the Total Tax Liability together exceed \$3.731 billion, NextWave agrees that it is not entitled to any reduction, offset, or refund of any payments. Once NextWave has satisfied its payment obligations set forth in this Section 9, and Sections 4(c), 7, and 8, the FCC and the United States shall have no rights to recover anything further from NextWave with regard to this

Agreement; provided, however, that nothing in this Agreement shall affect the liability of NextWave with respect to any liability arising out of fraud, antitrust, tax, or criminal claims.

c. Additional Payment. If the United States is entitled to terminate this Agreement as a result of Verizon's failure to cause the Verizon Letters of Credit to be issued pursuant to Section 11(a) and does not exercise such termination right, NextWave shall pay the sum of \$200 million to the United States on the first Business Day after receipt of the Cash Payment.

**10. Payments by NextWave to Verizon and Alaska.**

On the first Business Day after the receipt of the Cash Payment, but in no event later than December 31, 2002, NextWave shall pay (i) to the Cellco Partnership, d/b/a Verizon Wireless ("Verizon"), the sum of \$118.1 million, provided that Verizon has previously caused to be issued the Verizon Letters of Credit; and (ii) to Alaska Native Wireless, L.L.C. ("Alaska"), the sum of \$25 million, provided that Alaska has previously caused to be issued the Alaska Letters of Credit, such payments to be made by wire transfer of immediately available funds.

**11. Letters of Credit.**

a. Delivery of Letters of Credit.

i. Alaska shall cause to be issued for the benefit of the United States, on or prior to the latest of (i) the fifth Business Day following issuance of an FCC Order determining that the Commission is prepared to grant one or more closed Auction 35 licenses to Alaska, (ii) January 14, 2002, and (iii) the fifth Business Day after the entry of the Bankruptcy Settlement Approval Order, one or more irrevocable standby letters of credit in the aggregate amount of \$2,451,423,150 (each, individually an "Alaska Letter of Credit" and, collectively, the "Alaska Letters of Credit"). If Alaska fails to cause the Alaska Letters of Credit to be issued, no Party shall have any rights or remedies against Alaska in respect of such non-issuance, and neither Alaska nor any other person shall have any liability to any other Party in respect of any such non-issuance.

ii. Verizon (Verizon and Alaska, each an "LC Provider") shall cause to be issued for the benefit of the United States, on or prior to January 14, 2002, one or more irrevocable standby letters of credit in the aggregate amount of \$7,692,113,700 (each, individually, a "Verizon Letter of Credit" and, collectively, the "Verizon Letters of Credit"; the Alaska Letters of Credit and the Verizon Letters of Credit are from time to time referred to herein collectively as the "Letters of Credit").

iii. If Verizon fails to cause the Verizon Letters of Credit to be issued on or before January 14, 2002, in accordance with the terms of this Section 11, and fails to cure such non-issuance on or before January 24, 2002, the United States may terminate this Agreement by written notice to each Party provided on or before January 29, 2002. The Parties agree that this right of termination shall be the sole and exclusive remedy of the United States and the Commission against Verizon in the event that Verizon does not provide its applicable Letters of Credit pursuant to this Section 11, that no other Party shall have any rights or remedies against Verizon in respect of any such non-issuance or

in respect of the termination or the exercise by the United States of its right to terminate this Agreement, and that neither Verizon nor any other person shall have any liability to any other Party in respect of any such non-issuance.

iv. The obligations of Alaska and Verizon under this Section 11 are several, not joint.

v. The United States shall, one day following the applicable Payment Date, provide written notice to the LC Provider if the United States has not received on the Payment Date amounts owed by such LC Provider if the payment of such amounts is secured by the LC Provider's Letter of Credit. On the first day after receiving such notice, the applicable LC Provider shall provide the United States with written notice stating the amount that the United States should draw on each Letter of Credit caused to be issued by such LC Provider in the event the United States draws on such LC Provider's Letters of Credit. Failure by an LC Provider to provide such notice in a timely manner shall not in any way prevent the United States from making a draw under such LC Provider's Letters of Credit.

vi. Each of the LC Providers will cause the bank or banks issuing its Letters of Credit to provide prompt telephonic confirmation to designated persons at the FCC, in the event of a draw on the Letters of Credit, that the draw has been honored and that the requisite funds have been transferred to the United States.

b. Terms of Letters of Credit. The Letters of Credit shall be issued in accordance with the following terms:

i. Each Letter of Credit shall be issued by a bank, shall contain the terms specified in this Section, and shall otherwise be in form and substance reasonably satisfactory to the United States. On or before the third day after the Effective Date, each of Alaska and Verizon shall provide the United States with notice of the names of the banks it contemplates may issue the Letters of Credit it is obligated to cause to be provided and thereafter shall provide the United States with a supplemental notice or supplemental notices of the names of any additional banks it contemplates may issue such Letters of Credit, with any such supplemental notices provided to the United States no later than fifteen (15) Business Days prior to the expected issuance of the Letters of Credit. If the United States determines that any bank so identified in the initial or any supplemental notice is unsatisfactory to it, the United States shall promptly provide notice to such effect to the LC Provider that identified such bank. Notwithstanding the foregoing, (x) any United States bank that (i) is among the 50 largest United States banks, determined on the basis of total assets as of December 31, 2000, (ii) whose deposits are insured by the Federal Deposit Insurance Corporation, and (iii) has a long-term unsecured credit rating issued by Standard & Poor's of A- or better (or an equivalent rating from another nationally recognized credit rating agency) shall be deemed satisfactory to the United States; and (y) any non-U.S. bank that (i) is among the 50 largest non-U.S. banks in the world, determined on the basis of total assets as of December 31, 2000 (determined on a U.S. dollar equivalent basis as of such date), (ii) has a branch office in New York City or such other branch office agreed to by the United States, (iii) has a long-term

unsecured credit rating issued by a widely-recognized credit rating agency that is equivalent to an A- or better rating by Standard & Poor's, and (iv) issues the Letter of Credit payable in United States dollars shall be deemed satisfactory to the United States. Not later than December 8, 2001, each LC Provider shall provide to the United States a proposed form or forms of such Letter of Credit. The United States shall review such form or forms as promptly as practicable and shall notify such LC Provider as promptly as practicable whether or not such form is satisfactory to the United States. Notwithstanding the foregoing, a Letter of Credit that conforms to the form attached hereto as Exhibit B shall be deemed satisfactory to the United States.

ii. The Letters of Credit shall expire on December 31, 2002, provided that the Letters of Credit may be terminated earlier as set forth in subsection (d) below or reduced as provided in subsection (c) below.

iii. The Letters of Credit shall provide for partial drawings.

iv. If an LC Provider has provided more than one Letter of Credit, then, subject to the LC Provider's giving the notice required pursuant to Section 11(a)(v), any draws on or reductions of such Letters of Credit shall be made pro rata based on the amount of each Letter of Credit, as set forth in more detail below, or on such other basis as an LC Provider and the United States shall agree.

v. Each Letter of Credit shall provide that the issuing bank honor a draw on the Letter of Credit not later than three (3) Business Days after presentation by the United States of the documentation required by the terms of the Letter of Credit.

vi. If a bank issuing a Letter of Credit declares bankruptcy, becomes insolvent, has a receiver or conservator appointed, or is taken over by applicable regulatory agencies, or if a non-U.S. bank issuing a Letter of Credit closes its branch office in New York City, the applicable LC Provider shall, at the request of the United States, promptly cause to be issued for the benefit of the United States a substitute Letter of Credit. The bank issuing such substitute Letter of Credit shall satisfy the criteria set forth in this Section 11(b), and the form of such substitute Letter of Credit shall be reasonably satisfactory to the United States.

vii. Each Letter of Credit issued by a non-U.S. bank shall provide that a draw on the Letter of Credit may be presented at the bank's branch office in New York City.

viii. Each Letter of Credit shall provide that a draw on the Letter of Credit may be presented by submission of the required documentation to the bank's address specified in the Letter of Credit, with presentation to be effected either by personal delivery or delivery by a nationally-recognized overnight delivery service.

c. Drawings under Letters of Credit. The issuance of the Letters of Credit shall not alter the times when payment is due from either Alaska or Verizon under Section 16 of this Agreement; the Letters of Credit are security for the LC Providers' payment obligations under Section 17 that may be drawn by the United States three (3) days after the Payment Date in respect of a particular Auction 35 License if the applicable LC Provider has not paid for such

License by such date. The United States will have the right to draw on a Letter of Credit, in accordance with its terms, if and only if all of the following events have occurred as of the date of such draw and the FCC so certifies in connection with any draw under such Letter of Credit that:

- “i. The LC Provider did not make a payment to the FCC in the amount of \$\_\_\_\_\_ pursuant to the terms of Sections 16 and 17 of the Settlement Agreement on or before the Payment Date applicable to such payment;
- ii. At least three (3) days have passed since the Payment Date for such payment; and
- iii. The LC Provider has not paid to the FCC the amount specified in clause (i) above.”

Subject to receiving the notice from an LC Provider set forth in clause (v) of subsection (a) of this Section 11, the FCC shall also certify as to the amount to be drawn under the Letter of Credit, which shall equal (a) the amount specified in clause (i) above multiplied by (b) an amount equal to (A) the initial amount of the Letter of Credit divided by (B) the total initial amount of all Letters of Credit provided by such LC Provider. If such notice is not received, then the FCC shall certify as to the amount to be drawn under the Letter of Credit, which shall be the amount specified in clause (i) above, less the aggregate amounts drawn under all other Letters of Credit provided by the LC Provider in connection with the defaulted payment described in clause (i) above.

d. Termination of Letters of Credit. Each Letter of Credit will provide that it shall be terminated on December 31, 2002 or, if earlier, immediately upon delivery to the issuing bank of a certificate from Alaska or Verizon, as the case may be, which has been countersigned, after prompt consultation with the United States Department of Justice, by an authorized signatory of the FCC (an “Authorized Signatory”), who shall be the Managing Director (or Acting Managing Director) of the FCC, or his or her designee, to the effect that one of the following circumstances has occurred:

- i. The Settlement Agreement has terminated in accordance with the provisions thereof;
- ii. The LC Provider has paid to the FCC all amounts it is required to pay under Section 17 of the Settlement Agreement;
- iii. A court of competent jurisdiction has entered an order that is Final, which has the effect of preventing the FCC from granting to the LC Provider its Auction 35 Licenses; or
- iv. The United States and the Commission have accepted Alternative Security Arrangements.

Any required countersignature by the Authorized Signatory shall not be discretionary, and such person shall provide such countersignature if the circumstances set forth in the certificate in question are true and correct.

e. **Reduction of Letter of Credit.** Each Letter of Credit will provide that the amount of the Letter of Credit shall be reduced upon delivery to the issuing bank of a certificate from the applicable LC Provider, which has been countersigned by an Authorized Signatory, stating that:

“i. The LC Provider has paid to the FCC the sum of \$ \_\_\_\_\_, representing an amount equal to the Amounts Due on Receipt paid for Auction 35 Licenses that were paid for and granted to such LC Provider in respect of which there have been no prior reductions of the amount of the Letter of Credit ;

ii. The amount of the Letter of Credit shall be reduced by \$ \_\_\_\_\_, which equals (a) the amount described in clause (i) multiplied by (b) an amount equal to (A) the initial amount of the Letter of Credit divided by (B) the total initial amount of all Letters of Credit provided by such LC Provider; and

iii. After giving effect to the reduction, the amount of the Letter of Credit shall be \$ \_\_\_\_\_ [insert amount of the Letter of Credit prior to reduction minus the amount specified in clause (ii)].”

Any required countersignature by the Authorized Signatory shall not be discretionary, and such person shall provide such countersignature if the facts set forth in the certificate in question are true and correct.

f. **No Injunction Against a Draw.** No Party shall seek to enjoin the United States from drawing on, or a bank from honoring, a Letter of Credit.

g. **Alternative Security Arrangements.** At any time, either LC Provider may propose to the United States alternative security arrangements in lieu of its Letters of Credit for its payment obligations under this Agreement. The United States and the Commission may, in their sole and absolute discretion, agree in writing to accept the substitution of such arrangements (such arrangements, if so accepted, “Alternative Security Arrangements”). Upon the implementation by the LC Provider of Alternative Security Arrangements, the LC Provider shall be deemed, for purposes of this Agreement, including without limitation, Sections 10, 11, and 12 and the definition of Final Bankruptcy Settlement Approval Date, to have caused to be issued its applicable Letters of Credit.

## 12. **Deposit Refunds.**

Upon the receipt by the United States of the Verizon Letters of Credit, the United States shall refund to Verizon the sum of \$854,679,300 from its Auction 35 Deposits held by the Commission, and upon the receipt by the United States of the Alaska Letters of Credit, the United States shall refund to Alaska the sum of \$272,380,350 from its Auction 35 Deposits held by the Commission. The Commission shall direct the payment of the refund after receiving instructions from the payor(s) of record, in accordance with the Commission’s auction refund procedures, such payments to be made as promptly as practicable but in any event within

fourteen (14) days of receipt of the applicable Letters of Credit, if the LC Provider has complied with such procedures.

**13. FCC Resolution of Pending Regulatory Challenges to the Designated Licenses.**

a. The FCC shall issue an FCC Order or FCC Orders taking all regulatory actions necessary to act on the pending matters specified in Schedule C1 hereto.

b. On or before the tenth Business Day after the Relinquishment Date, each of the applicable non-governmental Parties shall file with the Commission a request to withdraw the Commission filings set forth on Schedule C2, and the Commission shall act on such requests as necessary.

**14. FCC Resolution of License Applications Submitted in Connection with Auction 35.**

a. Subject to the provisions of this Agreement and the Legislation, the Commission shall endeavor to take all regulatory actions necessary to act on each application for an Auction 35 License submitted by the Participating Auction 35 Winning Bidders as promptly as practicable and shall issue one or more Disposition Orders regarding such applications. A Grant Order shall be considered to be a Disposition Order.

b. In the event the Commission determines that any Participating Auction 35 Winning Bidder is not qualified under the Rules of the Commission or the Communications Act to hold an Auction 35 License for which it submitted the winning bid, that bidder remains subject to this Agreement, including the last sentence of Section 31(g).

**15. Resolution of Pending Matters Not Prejudged and Authority Not Impaired.**

Nothing in this Agreement shall be construed (a) to suggest that the FCC has prejudged the qualifications of a Participating Auction 35 Winning Bidder to hold an FCC license, or the disposition of any applications for Auction 35 Licenses or any other pending proceedings, or (b) to impede the FCC from exercising the full extent of its authority in deciding whether to grant any such application.

**16. Timing of Payment to FCC by Participating Auction 35 Winning Bidders.**

a. Basic Payment Deadline. A Participating Auction 35 Winning Bidder shall pay to the FCC the applicable Amount Due on Receipt no later than the date (the "Payment Date") which is the later of (i) ten (10) Business Days after the issuance of the Grant Order with respect to a particular Auction 35 License and (ii) June 28, 2002; provided, however, that the Payment Date for a Participating Auction 35 Winning Bidder as to which no Disposition Order has been released on or before March 29, 2002 shall be the later of the date determined above and ninety (90) days following the release of the first Disposition Order with respect to any license offered in Auction 35 applicable to that Participating Auction 35 Winning Bidder; and provided, further, that notwithstanding anything to the contrary in Sections 14 and 16, no Grant Order shall be issued prior to the Relinquishment Date. An applicable Payment Date may be further extended but cannot be shortened by subsections (b), (c) and (d) of this Section 16.

b. Court Remand. In the event of the entry of a court order in litigation authorized by the exclusive review provisions of the Legislation that remands or refers to the Commission a proceeding brought to review the constitutionality of the Legislation or to review the FCC Settlement Approval Order (such court order, the "Remand Order"), the Payment Date shall not occur until ten (10) Business Days after (i) the entry of a court order reversing or overturning such Remand Order, or (ii) the Commission has, subsequent to the Remand Order, released an order approving the Agreement ("Commission Order on Remand"), and (A) the time for seeking judicial review of the Commission Order on Remand has expired and such review has not been sought, or (B) the United States Court of Appeals for the District of Columbia Circuit has entered an order affirming the Commission Order on Remand.

c. Court Reversal or Vacatur. In the event of the entry of a court order in litigation authorized by the exclusive review provisions of the Legislation that reverses or vacates, but does not remand or refer, the FCC Settlement Approval Order (such court order, the "Reversal Order"), the Payment Date shall not occur until ten (10) Business Days after the entry of a subsequent order by the United States Court of Appeals for the District of Columbia Circuit or the United States Supreme Court, whichever is earlier, that reverses or vacates the Reversal Order or affirms the FCC Settlement Approval Order, or the FCC Settlement Approval Order otherwise becomes Final.

d. Order Invalidating the Legislation. In the event of the entry of a court order in litigation authorized by the exclusive review provisions of the Legislation that invalidates the Legislation (the "Invalidation Order"), the Payment Date shall not occur until ten (10) Business Days after (i) the Invalidation Order is reversed or vacated, or (ii) the FCC Settlement Approval Order otherwise becomes Final.

e. Early Payment. Any Participating Auction 35 Winning Bidder may, at its option, at any time after the release of the Grant Order or Orders for its Auction 35 Licenses, and prior to the Payment Date, tender payment of the Amount Due on Receipt in respect of all of the Auction 35 Licenses as to which Grant Orders have been released with respect to such Participating Auction 35 Winning Bidder and thereby receive those Licenses upon payment. Any Participating Auction 35 Winning Bidder who wishes to pay for and receive such Licenses prior to the Payment Date shall notify the Commission in writing of such intent.

f. Failure to Pay. Any Participating Auction 35 Winning Bidder that fails to pay, by the applicable Payment Date, the Amount Due on Receipt for an Auction 35 License shall be in default with respect to such License under the Rules of the Commission and immediately subject to the payment and default obligations specified therein; provided, however, that no such default shall arise with respect to Alaska or Verizon to the extent its payment obligations may be or have been satisfied by a draw on its Letters of Credit or recourse to any Alternative Security Arrangements.

**17. Amount of Payment to FCC by Participating Auction 35 Winning Bidders.**

On the applicable Payment Date, each Participating Auction 35 Winning Bidder that the Commission determines to be qualified to hold one or more Auction 35 Licenses shall pay to the FCC the Amount Due on Receipt for each Auction 35 License with respect to which the

Commission has made such determination. This Section is not intended to, and shall not be construed to, preclude use of any auction discount voucher in accordance with its terms to the extent such discount voucher is otherwise available to a Participating Auction 35 Winning Bidder.

**18. Reserved.**

**19. Certiorari in the D.C. Circuit Proceedings.**

If any petition for a writ of certiorari pertaining to the actions that are part of the D.C. Circuit Proceedings is pending on the Effective Date, or if any petition is filed after the Effective Date, then NextWave agrees to apply to extend the time for it to respond to such petition, and to file for further extensions, as necessary, to extend the deadline for its response past the Final Bankruptcy Settlement Approval Date. The Parties, other than NextWave, that are also parties to the certiorari proceedings agree not to oppose any such application to extend. At such time as the United States Supreme Court refuses to extend NextWave's time to respond and all other available means of obtaining deferral have been exhausted, all Parties that are also parties to the certiorari proceedings agree to file a joint motion to defer consideration of the petitions for certiorari until after the Final Bankruptcy Settlement Approval Date. In the event that the United States Supreme Court grants certiorari before the Final Bankruptcy Settlement Approval Date, the parties shall seek to defer briefing on the merits through that date. After the Final Bankruptcy Settlement Approval Date, the Parties that are also parties to the certiorari proceedings shall promptly cause the withdrawal of any pending petitions for certiorari to which they are a party, pertaining to the actions that are part of the D.C. Circuit Proceedings, and shall seek dismissal if certiorari has been granted. It is the intent of the parties that, except as otherwise provided in this Agreement, no decision of any court shall excuse performance of this Agreement unless such decision expressly invalidates the Agreement or makes compliance with the Agreement unlawful.

**20. No Decision on the Merits.**

This Agreement sets forth a compromise and settlement of disputed claims for the purpose of avoiding the costs, disruptions, and uncertainties associated with further litigation. Such compromise and settlement does not constitute a ruling on the merits, an admission as to any issue of fact or principle at law or an admission of liability of any Party. Any and all such admissions are expressly denied by all Parties to this Agreement. Nothing in this Agreement is meant to imply that an FCC license can be considered property of an estate in bankruptcy, or that an FCC licensee, by virtue of its license, holds any property interest in the spectrum. The use of the phrases "returning a license" or "surrendering a license" (or use of variants of such phrases) in this Agreement is meant only to refer to the relinquishment of the authorizations specified in a license.

**21. No Admission of Jurisdiction.**

Nothing in this Agreement should be construed as an admission by the FCC that a bankruptcy court or district court has subject matter jurisdiction to review decisions of the FCC with respect to the allotment, allocation, or assignment of spectrum licenses.

22. **Mutual Release of Claims.**

a. NextWave releases, acquits, and forever discharges:

i. upon delivery of the Cash Payment and the Advance Tax Payment, the FCC and the United States, together with each and every past and present agent, servant, employee, representative, or attorney thereof, and

ii. upon the Relinquishment Date, each Participating Auction 35 Winning Bidder, together with each and every past and present, direct or indirect, member, shareholder, owner and affiliate thereof, and each officer, director, manager, partner, principal, agent, servant, employee, representative, and attorney of each of the foregoing,

from any and all claims, causes of action, suits, debts, liens, obligations, liabilities, demands, losses, costs and expenses (including attorneys' fees) of any kind, character, or nature whatsoever, known or unknown, fixed or contingent (collectively, hereinafter, the "Claims"), which NextWave may have or claim to have now or which may hereafter arise out of, relate to, or be connected with any act of commission or omission, or other circumstances, existing or occurring prior to the Effective Date relating to the Designated Licenses (including any claims for a refund or a return of its down payments), to Covered Spectrum or to Auction 35.

b. Effective upon the receipt by the United States of Settlement Payments from NextWave of \$3.731 billion and any amounts required to be paid by NextWave pursuant to Section 9(c), and subject to the condition that the Relinquishment Date shall previously have occurred, the FCC and the United States release, acquit, and forever discharge NextWave and each and every past and present, direct or indirect, member, shareholder, owner, and affiliate thereof, and each officer, director, manager, partner, principal, agent, servant, employee, representative, and attorney of NextWave, from any and all Claims which the FCC and the United States may have or claim to have now or which may hereafter arise out of, relate to, or be connected with any act of commission or omission, or other circumstances, existing or occurring prior to the Effective Date relating to the Designated Licenses, to Covered Spectrum, or to Auction 35, except with respect to federal taxes. The United States' release includes, but is not limited to, the release of the proof of claim the United States filed in the Bankruptcy Proceedings, which it will withdraw with prejudice. Notwithstanding anything to the contrary in this subsection (b), nothing in this Agreement shall affect the liability of any of the non-governmental Parties to the United States or the FCC arising out of fraud, antitrust, tax, or criminal claims, or out of violations of the Rules of the Commission involving misrepresentation, lack of candor, collusion prohibited by Section 1.2105 of the Rules of the Commission or other acts of substantial misconduct.

c. Effective upon the FCC's receipt of the full and final Amounts Due on Receipt from a Participating Auction 35 Winning Bidder for all of its Auction 35 Licenses that it is qualified to hold (and for so long as the United States has not refunded such amounts or, having refunded such amounts, upon repayment of them pursuant to Section 31), the FCC and the United States release, acquit and forever discharge the relevant Participating Auction 35 Winning Bidder and each and every past and present, direct or indirect, member, shareholder, owner, and affiliate thereof, and each officer, director, manager, partner, principal, agent,

servant, employee, representative, and attorney of each of the foregoing, from any and all Claims which the FCC and the United States may have or claim to have now or which may hereafter arise out of, relate to, or be connected with any act of commission or omission, or other circumstances, existing or occurring prior to the Effective Date relating to the Designated Licenses, to Covered Spectrum or to Auction 35. Notwithstanding anything to the contrary in this subsection (c), nothing in this Agreement shall affect the liability of any of the non-governmental Parties to the United States or the FCC arising out of fraud, antitrust, tax, or criminal claims, or out of violations of the Rules of the Commission involving misrepresentation, lack of candor, collusion prohibited by Section 1.2105 of the Rules of the Commission or other acts of substantial misconduct.

d. Effective upon the Relinquishment Date, each Participating Auction 35 Winning Bidder releases, acquits, and forever discharges NextWave and each and every past and present, direct or indirect, member, shareholder, owner, and affiliate thereof, and each officer, director, manager, partner, principal, agent, servant, employee, representative, and attorney of NextWave, and its creditors, from any and all Claims which any such Participating Auction 35 Winning Bidder may have or claim to have now or which may hereafter arise out of, relate to, or be connected with any act of commission or omission, or other circumstances, existing or occurring prior to the Effective Date relating to the Designated Licenses, to Covered Spectrum, or to Auction 35; provided, however, that a Participating Auction 35 Winning Bidder's release of NextWave pursuant to this Section 22 does not include proof of claim No. 211 filed by Primeco Personal Communications LP in the Bankruptcy Proceedings.

e. Subject to the second sentence of Section 23(a) and effective upon grant to a Participating Auction 35 Winning Bidder of all of its respective Auction 35 Licenses that it is qualified to hold, each such Participating Auction 35 Winning Bidder releases, acquits, and forever discharges the FCC and the United States, together with each and every past and present agent, servant, employee, representative, or attorney thereof, from any and all Claims which any such Participating Auction 35 Winning Bidder may have or claim to have now or which may hereafter arise out of, relate to, or be connected with any act of commission or omission, or other circumstances, existing or occurring prior to the Effective Date relating to the Designated Licenses, to Covered Spectrum, or to Auction 35; provided, however, if the FCC's failure to grant any such Auction 35 Licenses is due to the Participating Auction 35 Winning Bidder's failure to pay for and accept such Licenses, this release will become effective upon the later of (x) the last applicable Payment Date for all Licenses the Participating Auction 35 Winning Bidder was qualified to hold, or (y) the date of the last applicable FCC Order that is Final and that disposes of any challenges to the Grant Orders or Disposition Orders relating to any such non-issued Licenses; provided, further, that if the Participating Auction 35 Winning Bidder accepts any Auction 35 Licenses but challenges any aspect of the Grant Orders or Disposition Orders relating to any such Licenses, this release will become effective upon the date of the last applicable FCC Order that is Final and that disposes of such challenges; provided, further, that if the FCC grants no Licenses to a Participating Auction 35 Winning Bidder because such bidder is not qualified to hold any such Licenses, this release will become effective upon the later of (x) the release date of the last Disposition Order determining that the Participating Auction 35 Winning Bidder is not qualified to hold an Auction 35 License, or (y) the date of the last applicable FCC Order that is Final and that disposes of any challenges to any Disposition Orders determining that the Participating Auction 35 Winning Bidder is not qualified to hold such

Auction 35 Licenses. This release shall remain effective so long as the United States has not refunded the applicable Amounts Due on Receipt or, having refunded such amounts, upon repayment of them pursuant to Section 31.

f. Nothing contained in this Section 22 shall act to waive, limit or impair the FCC's or the United States' authority to enforce the laws of the United States, including, but not limited to, the assessment and collection of sums due pursuant to the Internal Revenue Code of 1986, as amended, and the Treasury regulations thereunder and the FCC's exercise of authority over the public spectrum (and without limitation over licenses issued by the Commission) under the Communications Act and the Rules of the Commission to the extent consistent with the Legislation and this Agreement. Nothing contained in this Section 22 shall act to waive, limit or impair the rights or obligations of the Parties under this Agreement.

23. **Waivers.**

a. **Review of FCC Implementing Orders.** To the extent that the FCC Implementing Orders implement and are not inconsistent with the Legislation and the terms of this Agreement and this Agreement remains in effect, NextWave and the Participating Auction 35 Winning Bidders waive any and all rights they may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of this Agreement, the FCC Implementing Orders and the Legislation. Notwithstanding anything in this provision or Section 22(e) to the contrary, each Participating Auction 35 Winning Bidder reserves any rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay or to otherwise challenge or contest the validity of FCC Orders disposing of its individual Auction 35 license applications, but only to the extent such reconsideration, review, appeal, stay or other challenge or contest does not implicate the validity or enforceability of this Agreement, the Legislation or the FCC Settlement Approval Order.

b. **Enforcement of FCC Implementing Orders.** Except as provided in the second sentence of Section 23(a), NextWave and the Participating Auction 35 Winning Bidders agree that if the United States or the FCC brings a judicial action to enforce the terms of the FCC Implementing Orders on or after the effective date of the Legislation, NextWave and the Participating Auction 35 Winning Bidders shall not contest the validity of the FCC Implementing Orders to the extent that the FCC Implementing Orders implement and are consistent with the Legislation and the terms of this Agreement. The FCC agrees to exercise its authority to enforce the FCC Implementing Orders only in a manner that is not inconsistent with the Legislation and the terms of this Agreement.

c. **Waivers of Rights to Challenge Commission Action.** Subject to subsection (a) of this Section 23, the Parties explicitly waive the right to challenge (i) this Agreement; (ii) the Legislation; (iii) the FCC Implementing Orders to the extent those orders are consistent with this Agreement and the Legislation; and (iv) any actions taken by the Commission to enforce this Agreement or the Legislation, including the imposition of payment and default obligations, to the extent those actions are consistent with the Rules of the Commission and with this Agreement and the Legislation; provided, however, that NextWave does not waive the right to challenge decisions by the Commission in the matters set forth in Sections 6(a) and 13(a). The Parties expressly waive the right to rely on statutory rights, including those set forth in the Bankruptcy

Code, that might allow a carrier to recapture, reduce, avoid, or set aside its payment to the United States. However, nothing in this provision shall waive or otherwise preclude NextWave from asserting the Bankruptcy Code rights that it already has asserted, except to the extent that the assertion of those rights is inconsistent with this Agreement or the Legislation.

d. Future Licensing Actions. As of the Effective Date, and except as set forth in Section 22(b), the Commission agrees that the qualifications of NextWave and its past or present officers, directors, and shareholders, to participate in future auctions or hold licenses shall not be limited, restricted or otherwise burdened as a result of debt incurred by NextWave related to the Designated Licenses or as a result of any actions or inactions relating to the debt.

**24. Termination of the Agreement and of Auction 35 License Obligations.**

a. With Respect to All Parties. This Agreement shall terminate as to all Parties (i) if legislation relating to this Agreement is not enacted on or before December 31, 2001, or if the FCC has not released the FCC Settlement Approval Order on or before January 10, 2002; (ii) if the United States terminates this Agreement pursuant to Section 11(a)(iii); (iii) if a Final court order precludes, or has the legal effect of precluding, the United States from paying all or part of the Cash Payment or the Advance Tax Payment; or (iv) if the Final Bankruptcy Settlement Approval Date has not occurred on or before December 31, 2002. If this Agreement terminates pursuant to clauses (i) or (ii) of this subsection (a), then all rights and obligations of the Parties under this Agreement shall terminate, no Party shall have any liability under this Agreement to any other Party, except for rights and obligations of the Parties in this Section 24 and Sections 10, 20, 21, 25, 28, 29, 30, 35 and 37, which shall survive the termination of this Agreement, and except that (A) nothing herein shall relieve any Party from liability for any breach of any agreement, representation, warranty, or covenant herein on or prior to such termination, and (B) the Participating Auction 35 Winning Bidders shall remain subject to the Rules of the Commission that would apply in the absence of this Agreement. If this Agreement terminates pursuant to clause (iii) of this subsection (a) after the Relinquishment Date, any licenses to use the Covered Spectrum shall immediately cancel and the Commission shall immediately reinstate the Designated Licenses to NextWave to the status provided in Public Notice, DA 01-2045 (released August 31, 2001). If this Agreement terminates pursuant to clause (iii) or (iv) of this subsection, then (A) all rights and obligations of the Parties under this Agreement shall terminate, and no Party shall have any liability under this Agreement to any other Party, except for rights and obligations of the Parties in this Section 24 and Sections 10, 20, 21, 25, 28, 29, 30, 35 and 37, which shall survive the termination of this Agreement and except that nothing herein shall relieve any Party from liability for any breach of any agreement, representation, warranty or covenant herein on or prior to such termination, (B) the rights and obligations of the Participating Auction 35 Winning Bidders with respect to the Auction 35 Licenses shall terminate, and any and all obligations of the Participating Auction 35 Winning Bidders with respect to the Auction 35 Licenses shall be deemed canceled and rescinded, and (C) each Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay to each Participating Auction 35 Winning Bidder, a full refund of all of its prior payments with respect to its Auction 35 Licenses, including its Amounts Due on Receipt and Auction 35 Deposits.

b. With Respect to One or More, But Not All, Individual Licenses. In the event of a Termination of Auction 35 License Obligations with respect to one or more, but not all, of any Participating Auction 35 Winning Bidder's Auction 35 Licenses, all rights and obligations of the applicable Participating Auction 35 Winning Bidder under this Agreement with respect to the applicable Auction 35 License or Licenses shall terminate, the applicable Participating Auction 35 Winning Bidder shall have no liability under this Agreement to any other Party with respect to such Auction 35 License or Licenses, and no other Party shall have any liability to the applicable Participating Auction 35 Winning Bidder with respect to such Auction 35 License or Licenses, except that the applicable Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay to such Participating Auction 35 Winning Bidder, a full refund of all its prior payments with respect to the Auction 35 Licenses for which all Auction 35 obligations are terminated, including the applicable Auction 35 Deposit and any applicable Amount Due on Receipt, and except that nothing herein shall relieve any Party from liability for any breach of any agreement, representation, warranty, or covenant herein on or prior to such termination with respect to such Auction 35 Licenses. Except as otherwise provided in this subsection, this Agreement shall remain in effect between such Participating Auction 35 Winning Bidder and all other Parties.

c. Termination by an Individual Bidder. If a Termination of Auction 35 License Obligations with respect to all Auction 35 Licenses of a Participating Auction 35 Winning Bidder occurs (such Participating Auction 35 Winning Bidder, a "Terminating Bidder"), then all rights and obligations of the Terminating Bidder under this Agreement shall terminate, that Terminating Bidder shall have no liability under this Agreement to any other Party, and no other Party shall have any liability to that Terminating Bidder under this Agreement, except that, (x) as set forth in Section 31, the Terminating Bidder shall be entitled to receive from the United States, and the United States shall pay to the Terminating Bidder, a full refund of all its prior payments with respect to all its Auction 35 Licenses, including all its Auction 35 Deposits and any Amounts Due on Receipt, (y) nothing herein shall relieve the Terminating Bidder from liability for any breach of any agreement, representation, warranty or covenant herein on or prior to such termination, and (z) the Terminating Bidder's rights and obligations in Sections 10, 20, 21, 24, 25, 28, 29, 30, 35, and 37 shall survive the termination of this Agreement.

d. Right to Withdraw. In the event that legislation relating to this Agreement is enacted that does not conform in all respects to Exhibit A, then (A) each non-governmental Party shall have (i) the right to review the non-conforming legislation to determine whether such Party shall proceed as a Party to this Agreement and (ii) the right to withdraw as a Party to this Agreement by providing notice to each of the other Parties within ten (10) days after enactment of such legislation (such notice to be effective upon receipt by the Commission), but in any event no later than January 7, 2002, (B) the United States shall have the right to withdraw as a Party to this Agreement by providing notice to each of the other Parties within fifteen (15) days after enactment of such legislation (such notice to be effective upon receipt by the Commission), but in any event no later than January 10, 2002, and (C) the Agreement will terminate unless, on or before January 10, 2002, the FCC issues the FCC Settlement Approval Order. If the United States or NextWave or Verizon withdraws as a Party, or if every other Participating Auction 35 Winning Bidder whose winning bids, in the aggregate, for the Auction 35 Licenses for which such bidder submitted the winning bids, exceeded \$350 million withdraws as a Party, then this Agreement shall terminate. If this Agreement terminates pursuant to either of the previous two

sentences, then such a termination shall have the same effect as though it were a termination pursuant to Section 24(a)(i). If the Agreement remains in effect as to some or all of the Parties, the rights and obligations of the non-withdrawing Parties set forth in this Agreement shall continue except that the legislation enacted shall be deemed the "Legislation" for purposes of this Agreement, and the Agreement shall be deemed amended as necessary to conform to such Legislation.

If an individual Participating Auction 35 Winning Bidder withdraws as a Party to this Agreement pursuant to this subsection (d) and this Agreement does not terminate as to all Parties, then all rights and obligations of such Participating Auction 35 Winning Bidder under this Agreement shall terminate, such bidder shall have no liability under this Agreement to any other Party, and no other Party shall have any liability to such bidder, except that such bidder's rights and obligations in this Section 24 and Sections 10, 20, 21, 25, 28, 29, 30, 35 and 37, shall survive the termination of this Agreement and except that (A) nothing herein shall relieve any Party from liability for any breach of any agreement, representation, warranty, or covenant herein on or prior to such termination, and (B) such bidder shall remain subject to the Rules of the Commission that would apply in the absence of this Agreement.

e. Effect on Waivers and Releases. In the event that this Agreement terminates in accordance with this Section, any and all waivers and releases theretofore given by any Party to another Party pursuant to Sections 6, 22 and 23 shall be deemed to be void *ab initio*, except that with respect to termination under Section 24(b), such waivers and releases given by any Party to the Terminating Bidder or by the Terminating Bidder to any Party shall be deemed void *ab initio* only insofar as such waivers and releases apply to the applicable Auction 35 Licenses of the Terminating Bidder. Notwithstanding anything to the contrary in this Section, no termination of this Agreement (other than a termination pursuant to Section 24(a)(iii)) shall invalidate any waivers and releases pursuant to Sections 22 and 23 of this Agreement given to or by NextWave after the Relinquishment Date.

f. Status of Bid Withdrawal Penalties. Notwithstanding anything to the contrary in this Agreement, in the event of a termination under this Section 24 or a Termination of Auction 35 License Obligations, a Participating Auction 35 Winning Bidder's obligations to pay any unpaid bid withdrawal penalties, or any right to a refund of any bid withdrawal penalties that have been paid, shall be determined by the Rules of the Commission that would apply in the absence of this Agreement.

**25. No Joint and Several Liability of Participating Auction 35 Winning Bidders.**

Each Participating Auction 35 Winning Bidder is individually responsible for its own compliance with this Agreement, including any payment obligations applicable to such Participating Auction 35 Winning Bidder. Each Participating Auction 35 Winning Bidder is responsible only for its own performance or non-performance of obligations, and the Participating Auction 35 Winning Bidders do not have joint and several liability with regard to any such obligation. The failure of any Participating Auction 35 Winning Bidder to satisfy its payment or any other obligations shall not affect (i) the rights or obligations of the other Participating Auction 35 Winning Bidders to the Auction 35 Licenses for which such

Participating Auction 35 Winning Bidders are not in default of any payment obligations or (ii) the validity of such Auction 35 Licenses.

**26. Participating Auction 35 Winning Bidders with Bids under \$10 Million.**

By executing this Agreement, any Participating Auction 35 Winning Bidder whose total winning bids for Auction 35 Licenses do not exceed \$10 million waives its right under the Legislation to elect to withdraw all of its bids for Auction 35 Licenses.

**27. Opportunity to Become a Party for Auction 35 Winners Not Party to this Agreement.**

Any Auction 35 Winning Bidder not listed on Schedule A may become a signatory to this Agreement and therefore participate in the settlement contemplated hereby, provided that such entity delivers to the Commission, on behalf of all the then-existing Parties, an executed counterpart of this Agreement and the applicable information for inclusion on Schedule B, with a copy to all then-existing Parties, and that such counterpart and information is received by the Commission no later than (i) in the case of any Auction 35 Winning Bidder whose total winning bids for Auction 35 Licenses do not exceed \$10 million, no later than January 30, 2002, and (ii) in the case of any other Auction 35 Winning Bidder, twenty (20) days after the date of this Agreement. This Agreement shall be deemed amended to add such entity as a "Participating Auction 35 Winning Bidder" under this Agreement effective as of the date of delivery of such counterpart and notice, in accordance with this Section 27.

**28. Tolling of Regulatory Requirements.**

a. To the extent NextWave is required under the Rules of the Commission, including but not limited to 47 C.F.R. § 24.203, to meet certain construction requirements with respect to a Designated License within five (5) years of the initial license grant, such requirements are tolled from September 17, 2001, and the tolling period shall end only (i) upon a breach of this Agreement by NextWave, (ii) upon termination of this Agreement, or (iii) in the event of the entry of a judicial order barring NextWave's surrender and return of the Designated License, together with NextWave's relinquishment of any and all claims to the spectrum identified by the Designated License and to the Designated License.

b. To the extent NextWave would be relieved of any transfer of control or assignment of license restrictions with respect to a Designated License under the Rules of the Commission, including but not limited to 47 C.F.R. § 24.839, after five (5) years from the date of the initial license grant, this five-year period is tolled from September 17, 2001, and the tolling period shall end only (i) upon a breach of this Agreement by NextWave, (ii) upon termination of this Agreement, or (iii) in the event of the entry of a judicial order barring the surrender and return of the Designated License together with NextWave's relinquishment of any and all claims to the spectrum identified by the Designated License and to the Designated License.

c. Nothing in this Section shall be construed as a waiver of any argument that any Party to this Agreement may have that any build-out or other regulatory requirements relating to

the Designated Licenses were or were not tolled prior to September 17, 2001 or are not subject to additional tolling periods.

**29. Equal Access to Justice Act.**

NextWave and the Participating Auction 35 Winning Bidders waive any right they may have to seek attorneys fees or costs from the United States or the FCC pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and any other applicable law, effective on and after the effective date of the Legislation.

**30. FCC Jurisdiction.**

NextWave and the Participating Auction 35 Winning Bidders acknowledge that the FCC has jurisdiction to exercise its authority under the Communications Act and the Rules of the Commission with respect to them, the Designated Licenses, the Auction 35 Licenses, and the Covered Spectrum.

**31. Participating Auction 35 Winning Bidder Refund Rights/Termination of Auction 35 License Obligations.**

**a. Refunds and Post-Refund Terminations.** If, at any time on or before the Deadline Date, an order is entered by any court in a proceeding under the exclusive review provisions of the Legislation, that denies or has the legal effect of denying a Participating Auction 35 Winning Bidder's right to use the spectrum covered by one or more Auction 35 Licenses that were previously granted to, and paid for by, such Participating Auction 35 Winning Bidder, then the following shall apply:

**i. Refund of Amount Due on Receipt.** Such Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay, to such Participating Auction 35 Winning Bidder, a refund of the Amount Due on Receipt for each such License affected by such court order, provided that, except for refunds under clause (iii) below, no request for such refund may be made (x) prior to forty-five (45) days following the date of entry of the applicable court order or (y) while a stay of such order is in effect;

**ii. Repayment on Restoration of Rights.** If there is a refund pursuant to this subsection (a), and following such refund, on or before the Deadline Date the FCC restores, subject to timely repayment of the applicable Amounts Due on Receipt, the right to use the spectrum of such Participating Auction 35 Winning Bidder with respect to such Auction 35 Licenses, such Participating Auction 35 Winning Bidder shall re-pay to the FCC the Amount Due on Receipt in respect of each such Auction 35 License within ten (10) Business Days following release of the FCC Order restoring such spectrum usage rights and shall thereafter have all of the rights and obligations previously associated with such Auction 35 Licenses; and

**iii. Effect of Rights Not Restored.** If there is a refund pursuant to this subsection (a), and the right to use the spectrum of such Participating Auction 35 Winning Bidder with respect to such Auction 35 Licenses is not restored pursuant to

clause (ii) above on or before the Deadline Date, then, upon the request of such Participating Auction 35 Winning Bidder made to the FCC not later than ten (10) Business Days after the Deadline Date with respect to all such Auction 35 Licenses that have not been restored, the following shall occur: (x) any and all obligations of such Participating Auction 35 Winning Bidder to the FCC and/or the United States with respect to all such Auction 35 Licenses shall thereupon be deemed canceled and rescinded, (y) there shall be a refund of the Auction 35 Deposit paid in connection with all such Auction 35 Licenses, and (z) such Participating Auction 35 Winning Bidder shall have no further obligations with respect to all such Auction 35 Licenses.

**b. Termination on the Disposition Order Cutoff Date.** If on the Disposition Order Cutoff Date either (x) the Commission has not released, with respect to one or more Auction 35 Licenses for which a Participating Auction 35 Winning Bidder submitted the winning bids, either a Disposition Order finding that such Participating Auction 35 Winning Bidder is not qualified to hold an Auction 35 License or a Grant Order, or (y) there is in effect an order by any court in a proceeding under the exclusive review provisions of the Legislation that denies or has the legal effect of denying a Participating Auction 35 Winning Bidder's right to use the spectrum covered by one or more Auction 35 Licenses (including any order that prevents the FCC from granting such Licenses to such Bidders), then, upon the request of such Participating Auction 35 Winning Bidder made to the FCC not later than ten (10) Business Days after the Disposition Order Cutoff Date, the following shall occur:

**i. Termination of Auction 35 License Obligations.** Any and all obligations of such Participating Auction 35 Winning Bidder with respect to all Auction 35 Licenses for which it submitted the winning bids shall thereupon be deemed canceled and rescinded, and such Participating Auction 35 Winning Bidder shall have no further obligations with respect to all such Auction 35 Licenses; and

**ii. Refund of All Prior Payments.** Such Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay to such Participating Auction 35 Winning Bidder, a full refund of all its prior payments with respect to the Auction 35 Licenses for which all Auction 35 obligations are terminated pursuant to subparagraph (i) above, including the applicable Auction 35 Deposit and the applicable Amount Due on Receipt.

**c. Termination after the Deadline Date.** If, at any time after December 31, 2002, there is entered an order by any court in a proceeding under the exclusive review provisions of the Legislation that denies or has the legal effect of denying a Participating Auction 35 Winning Bidder's right to use the spectrum covered by one or more Auction 35 Licenses that were previously granted to such Participating Auction 35 Winning Bidder, then the following shall occur upon the request of such Participating Auction 35 Winning Bidder made to the FCC with respect to all such Licenses, provided that no such request may be made (x) prior to forty-five (45) days following the date of entry of the applicable court order or (y) while a stay of such order is in effect:

**i. Termination of Auction 35 License Obligations.** Any and all obligations of such Participating Auction 35 Winning Bidder with respect to all such

Auction 35 Licenses for which it submitted the winning bids shall thereupon be deemed canceled and rescinded, and such Participating Auction 35 Winning Bidder shall have no further obligations with respect to such Auction 35 Licenses; and

ii. **Refund of All Prior Payments.** Such Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay to such Participating Auction 35 Winning Bidder, a full refund of all of its prior payments with respect to all Auction 35 Licenses for which all Auction 35 obligations are terminated pursuant to subparagraph (i) above, including the applicable Auction 35 Deposit and the applicable Amount Due on Receipt.

d. **Termination Following a Remand Order.** In the event of a Remand Order, the Commission shall expedite its Commission Order on Remand to the greatest extent possible, with a view to issuing its Commission Order on Remand within sixty (60) days after the entry date of the Remand Order. If, under Section 16(b), a Remand Order results in a deferral of a Payment Date for one or more Auction 35 Licenses of a Participating Auction 35 Winning Bidder until after December 31, 2002, then, for any such Participating Auction 35 Winning Bidder that has not elected to make early payment in accordance with Section 16(e), in addition to any otherwise applicable rights set forth in subsections (a), (b), and (c) of this Section, the following shall pertain:

i. If the Commission fails to issue a Commission Order on Remand granting, affirming, or restoring such Participating Auction 35 Winning Bidder's right to such Auction 35 Licenses, on or before the Deadline Date, such Participating Auction 35 Winning Bidder shall have the termination and refund rights set forth in subparagraphs (x) and (y) below effective on the Deadline Date.

ii. If the Commission issues a Commission Order on Remand granting, affirming, or restoring such Participating Auction 35 Winning Bidder's right to such Auction 35 Licenses before the Deadline Date and within ninety days after the date of entry of the applicable Remand Order, then such Participating Auction 35 Winning Bidder shall have the termination and refund rights set forth in subparagraphs (x) and (y) below effective as of the 90th day after the Deadline Date, unless before that date (A) a court enters an order reversing or vacating such Remand Order, or (B) the time for seeking judicial review of the Commission Order on Remand expires without any such review having been sought, or the United States Court of Appeals for the District of Columbia Circuit enters an order affirming the Commission Order on Remand.

iii. If the Commission issues a Commission Order on Remand granting, affirming, or restoring such the right of such Participating Auction 35 Winning Bidder to such Auction 35 Licenses before the Deadline Date but more than ninety days after the date of entry of the applicable Remand Order, then such Participating Auction 35 Winning Bidder shall have the termination and refund rights set forth in subparagraph (x) and (y) below effective as of the 60th day after the Deadline Date, unless before that date (A) a court enters an order reversing or overturning such Remand Order, or (B) the time for seeking judicial review of the Commission Order on Remand expires without any

such review having been sought, or the United States Court of Appeals for the District of Columbia Circuit enters an order affirming the Commission Order on Remand.

Upon the request of a Participating Auction 35 Winning Bidder made to the FCC not later than ten (10) Business Days after the first date on which such bidder is authorized to terminate under this subsection, the following shall occur:

(x) **Termination of Auction 35 License Obligations.** Any and all obligations of such Participating Auction 35 Winning Bidder with respect to all Auction 35 Licenses affected by the Remand Order shall thereupon be deemed canceled and rescinded, and such Participating Auction 35 Winning Bidder shall have no further obligations with respect to such Auction 35 Licenses; and

(y) **Refund of All Prior Payments.** Such Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay to such Participating Auction 35 Winning Bidder, a full refund of all of its prior payments with respect to all Auction 35 Licenses for which all Auction 35 obligations are terminated pursuant to subparagraph (x) above, including the applicable Auction 35 Deposit.

e. **Termination Following Reversal or Invalidation.** In the event of a Reversal Order or Invalidation Order that operates, in accordance with Sections 16(c) or 16(d), to defer the Payment Date for a Participating Auction 35 Winning Bidder until after December 31, 2002, any such Participating Auction 35 Winning Bidder that has not elected to make early payment in accordance with Section 16(e) shall have, in addition to any otherwise applicable rights set forth in subsections (a), (b), and (c) of this Section, the termination and refund rights set forth in subparagraphs (i) and (ii) below effective as of the 90th day after the Deadline Date, unless before that date a court enters an order reversing or overturning such Reversal Order or Invalidation Order. Upon the request of such Participating Auction 35 Winning Bidder made to the FCC not later than ten (10) Business Days after the first date on which such bidder is authorized to terminate under this subsection, the following shall occur:

i. **Termination of Auction 35 License Obligations.** Any and all obligations of such Participating Auction 35 Winning Bidder with respect to all Auction 35 Licenses affected by the Reversal Order or Invalidation Order shall thereupon be deemed canceled and rescinded, and such Participating Auction 35 Winning Bidder shall have no further obligations with respect to such Auction 35 Licenses; and

ii. **Refund of All Prior Payments.** Such Participating Auction 35 Winning Bidder shall be entitled to receive from the United States, and the United States shall pay to such Participating Auction 35 Winning Bidder, a full refund of all of its prior payments with respect to all Auction 35 Licenses for which all Auction 35 obligations are terminated pursuant to subparagraph (i) above, including the applicable Auction 35 Deposit.

f. **Processing of Refund Requests.** Within fourteen (14) days following any timely request for a refund under Section 24 or this Section 31, the Commission shall ask the United

States Department of Treasury to issue the appropriate refund by wire transfer of immediately available funds.

**g. Loss for Failure to Comply with Rules.** Notwithstanding the foregoing provisions of this Section 31, no Participating Auction 35 Winning Bidder shall be entitled to a refund or any rights to terminate its Auction 35 License obligations under subsection (a), (b), (c), (d), or (e) if the loss or failure to hold any Auction 35 License is due to such Participating Auction 35 Winning Bidder's failure to comply with the Rules of the Commission that are not inconsistent with this Agreement and the Legislation. To the extent a refund is not available under subsections (a), (b), (c), (d) or (e) of this Section 31 due to such failure, then such Participating Auction 35 Winning Bidder, in seeking a refund of any of its prior payments with respect to Auction 35 and/or this Agreement, shall be subject to the Rules of the Commission that would apply in the absence of this Agreement.

**h. Certain Liabilities Unaffected by Termination of Auction 35 License Obligations.** Notwithstanding anything to the contrary in this Section or Section 24, nothing in this Agreement shall affect the liability of any of the non-governmental Parties arising out of fraud, antitrust, tax, or criminal claims, or out of violations of the Rules of the Commission involving misrepresentation, lack of candor, collusion prohibited by Section 1.2105 of the Rules of the Commission or other acts of substantial misconduct.

**32. Amendments.**

Except to the extent otherwise provided in Section 24(d) and Section 27, no amendment, modification, or supplement to this Agreement shall be valid unless it is in writing and signed by duly authorized representatives of all of the Parties. The phrase "this Agreement" shall include all duly executed amendments, modifications and supplements hereto.

**33. Authority.**

Each Party represents and warrants that it has authority to execute this Agreement, subject in the case of NextWave to the Bankruptcy Settlement Approval Order, and subject in the case of the FCC to the FCC Settlement Approval Order. Each of the non-governmental Parties represents and warrants that this Agreement sets forth any and all cash consideration promised, paid or received from any other non-governmental Party as an inducement to enter into this Agreement.

**34. Compliance with Laws and Regulations.**

Each Party shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement.

**35. Expenses.**

Except as otherwise specifically set forth in this Agreement, each Party shall be solely responsible for its own expenses involved in all activities related to the subject of this Agreement, including, but not limited to, attorneys' fees and expenses.

**36. Cooperation and Good Faith Performance.**

The Parties shall cooperate to take all steps necessary, and execute all documents necessary, to effectuate this Agreement. In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistent with the intent of this Agreement, and shall do nothing to frustrate the terms of this Agreement. In situations in which notice, consent, approval or similar action by a Party is permitted or required by any provision of this Agreement, such action shall not be unreasonably delayed, withheld or conditioned. The FCC and the United States shall implement the provisions of this Agreement to the full extent permitted by law.

**37. Governing Law.**

This Agreement shall be governed by and construed in accordance with applicable federal law.

**38. Headings.**

The headings in this Agreement are inserted for convenience and identification only and shall not be considered in the interpretation of this Agreement.

**39. Multiple Counterparts.**

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

**40. No Third Party Beneficiaries.**

Except as may be specifically set forth in this Agreement, this Agreement does not provide and shall not be construed to provide any third party with any remedy, claim, liability, reimbursement, cause of action, or other right or privilege.

**41. Rule of Construction.**

The Parties acknowledge that all Parties have participated in the drafting and preparation of this Agreement and agree that any rule of construction to the effect that ambiguities are to be construed against the drafting party shall not be applied to the construction or interpretation of this Agreement.

**42. Notices.**

Any notice to a Party required or permitted under this Agreement shall be in writing and shall be deemed to have been received on the date of service if served personally, on the date receipt is acknowledged in writing by the recipient if delivered by regular U.S. mail, or on the date stated on the receipt if delivered by certified or registered mail or by a courier service that obtains a written receipt. Notice may also be provided by facsimile, subject to confirmation of receipt. Any notice shall be effective on the day received if received before 5:00 p.m., or if received after 5:00 p.m., on the next Business Day following the date received. Time of receipt shall be determined according to the local time for the recipient. Any notice shall be delivered using one of the alternatives mentioned in this Section and shall be directed to the applicable address

indicated below or such address as the Party to be notified has designated by giving notice in compliance with this Section:

If to NEXTWAVE:

NextWave Telecom Inc.  
601 13th Street, NW  
Suite 320 North  
Washington, DC 20005  
Attn: Frank Cassou, General Counsel  
Telephone: (202) 661-2080  
Facsimile: (202) 347-2822

With a copy (which shall not constitute notice) to:

Donald B. Verrilli, Jr.  
Jenner & Block  
601 13th Street, NW  
12th Floor  
Washington, DC 20005  
Telephone: (202) 639-6095  
Facsimile: (202) 639-6066

If to the United States:

The United States Department of Justice  
Office of the Assistant Attorney General, Civil Division  
950 Pennsylvania Avenue, Room 3141  
Washington, D.C. 20530  
Telephone: (202) 514-3301  
Facsimile: (202) 514-8071

With a copy (which shall not constitute notice) to:

The United States Department of Justice  
Office of the Deputy Attorney General  
950 Pennsylvania Avenue, Room 4141  
Attn: Chief of Staff  
Washington, D.C. 20530  
Telephone: (202) 514-1904  
Facsimile: (202) 514-0467

If to the FCC:

Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Attn: General Counsel  
Telephone: (202) 418-1700  
Facsimile: (202) 418-2822

With a copy (which shall not constitute notice) to:

Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
Attn: Chief, Wireless Telecommunications Bureau  
Telephone: (202) 418-0600  
Facsimile: (202) 418-0787

If to the Participating Auction 35 Winning Bidders: See Schedule B.

**43. Payment Instructions.**

All Payments to be made by the Parties pursuant to this Agreement shall be made by wire transfer of immediately available funds. If any date on which a payment is otherwise due, or by which an obligation is otherwise to be performed, under this Agreement is not a Business Day, then the payment shall be due on, or the obligations shall be performed by, the next Business Day.

**44. Further Assurances.**

Each Party shall at any time, and from time to time, upon the written request of another Party, execute and deliver such further documents, and do such further acts and things as another Party may reasonably request, to achieve the purposes of this Agreement.

**45. Entire Agreement.**

This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, negotiations, proposals, and representations, whether written or oral, and except as explicitly stated herein, all contemporaneous oral agreements, negotiations, proposals, and representations concerning such subject matter.

**46. Rules of the Commission.**

The Parties acknowledge that they shall remain subject to the Rules of the Commission except to the extent expressly modified by this Agreement and the Legislation.

**47. Successors and Assigns.**

This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Parties.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

**The United States of America**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Federal Communications Commission**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**3DL Wireless, LLC**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**3G PCS, LLC**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Alaska Native Wireless, L.L.C.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Black Crow Wireless, L.P.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Cellco Partnership, d/b/a/ Verizon Wireless**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Cook Inlet/VS GSM V PCS, LLC**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**DCC PCS, Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Lafayette Communications Company L.L.C.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Leap Wireless International, Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**NORTHCOAST COMMUNICATIONS, L.L.C.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**SVC BidCo, L.P.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Salmon PCS, LLC**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**VoiceStream PCS BTA I License Corporation**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**NextWave Personal Communications Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**NextWave Telecom Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**NextWave Partners Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**NextWave Power Partners Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**NextWave Wireless Inc.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

3DL Wireless, LLC  
3G PCS, LLC  
Alaska Native Wireless, L.L.C.  
Black Crow Wireless, LP  
Cellco Partnership, d/b/a Verizon Wireless  
Cook Inlet/VS GSM V PCS, LLC  
DCC PCS, Inc.  
Lafayette Communications Company, LLC  
Leap Wireless International, Inc.  
Northcoast Communications, LLC  
SVC Bidco, L.P.  
Salmon PCS, LLC  
VoiceStream PCS BTA I License Corporation

**SCHEDULE B: NOTICE INFORMATION**

This Schedule may be amended from time to time to include the notice information provided by Auction 35 Winning Bidders that become Parties pursuant to Section 27.

3DL Wireless, LLC

Mark Schultz  
3DL Wireless, LLC  
601 Union Street, Suite 4510  
Seattle, WA 98101  
Telephone: (206)805-4350  
Facsimile: (206)839-0201

With a copy (which shall not constitute notice) to:

Cheryl A. Tritt  
Morrison & Foerster, LLP  
2000 Pennsylvania Ave., Suite 500  
Washington, D.C. 20006  
Telephone: (202)887-1510

3G PCS, LLC

3G PCS, LLC  
Barry Lewis  
2420 Sand Hill Road; Suite 101  
Menlo Park, CA 94025  
Telephone: (650) 324-6885  
Facsimile: (650) 854-4512

With a copy (which shall not constitute notice) to:

Carl Northrop  
Paul, Hastings, Janofsky & Walker, LLP  
1299 Pennsylvania Avenue, NW  
10th Floor  
Washington, DC 20004  
Telephone: (202)508-9570  
Facsimile: (202)508-8570

Alaska Native Wireless, L.L.C.:

Alaska Native Wireless, L.L.C.  
c/o ASRC Wireless Services, Inc.  
301 Arctic Slope Avenue, Suite 300  
Anchorage, AK 99518  
Attention: Conrad N. Bagne  
Telephone: 907-349-2369  
Facsimile: 907-349-5476

With copies (which shall not constitute  
notice) to:

Doyon Communications, Inc.  
One Doyon Place, Suite 300  
Fairbanks, AK 99701-2941  
Attention: Miranda Wright  
Telephone: 907-459-2000  
Facsimile: 907-459-2075

Sealaska Telecommunications, LLC  
c/o Sealaska Corporation  
18000 International Blvd., Suite 1009  
Seatac, WA 98188  
Attention: Chris E. McNeil, Jr.  
Telephone: (206)902-4411  
Facsimile: (206)902-4004

Kirkland & Ellis  
Citigroup Center  
153 East 53rd Street  
New York, NY 10022  
Attn: Michael A. Brosse  
Telephone: (212) 446-4682  
Facsimile: (212) 446-6460

Black Crow Wireless, LP

Mark J. Kington  
Black Crow Wireless, LP  
600 Cameron Street  
Alexandria, VA 22314  
Telephone: (703) 519-7982  
Facsimile: (703) 519-3904

With a copy (which shall not constitute notice):

Allison Cryor  
Black Crow Wireless, LP  
201 N. Union Street, Suite 300  
Alexandria, VA 22314  
Telephone: (703) 519-3036  
Facsimile: (703) 519-3904

Cellco Partnership, d/b/a Verizon Wireless

Dennis F. Strigl  
Chief Executive Officer  
Verizon Wireless  
180 Washington Valley Road  
Bedminster, NJ 07921  
Telephone: (908) 306-7666  
Facsimile: (908) 306-4388

With copies (which shall not constitute notice) to:

S. Mark Tuller  
Vice President and General Counsel  
Verizon Wireless  
180 Washington Valley Road  
Bedminster, NJ 07921  
Telephone: (908) 306-7390  
Facsimile: (908) 306-7923

John Thorne  
Senior Vice President and Deputy General Counsel  
Verizon Communications Inc.  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909  
Telephone: (703) 351-3900  
Facsimile: (703) 351-3670

William Lake  
Wilmer, Cutler & Pickering  
2445 M Street, NW  
Washington, DC 20037  
Telephone: (202) 663-6000  
Facsimile: (202) 663-6363

Cook Inlet/VS GSM V PCS, LLC

Cook Inlet Region, Inc.  
Keith Sanders, Esq.  
General Counsel  
2525 C Street, Suite 500  
Anchorage AK 99503  
Telephone: (907) 274-8638  
Facsimile: (907) 263-5182

With a copy (which shall not constitute notice) to:

Jonathan D. Blake  
Covington & Burling  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004-2401  
Telephone: (202) 662-6110  
Facsimile: (202) 662-6291

DCC PCS, Inc.

DCC PCS, Inc.  
Everett R. Dobson  
Chief Executive Officer  
Dobson Communications Corporation  
14201 Wireless Way  
Oklahoma City, OK 73134  
Telephone: (405)529-8500  
Facsimile: (405)529-8765

With a copy (which shall not constitute notice) to:

Ronald L. Ripley, Esq.  
Senior Corporate Counsel  
Dobson Communications Corporation  
14201 Wireless Way  
Oklahoma City, OK 73134  
Telephone: (405)529-8500  
Facsimile: (405)529-8765

Lafayette Communications Company, LLC

John M. Duff  
Lafayette Communications Company, LLC  
Two Embarcadero Center  
Suite 2300  
San Francisco, CA 94111  
Telephone: (415) 788-2755  
Facsimile: (415) 788-7311

With a copy (which shall not constitute  
notice) to:

Leonard J. Baxt  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, NW  
Washington, DC 20036-6802  
Telephone: (202)776-2000  
Facsimile: (202)776-2222

Leap Wireless International, Inc.

Leap Wireless International Inc.  
10307 Pacific Center Court  
San Diego, CA 92121  
Attention: James Hoffmann  
Senior Vice President and General  
Counsel  
Telephone: (858) 882-6000  
Facsimile: (858) 882-6080

Northcoast Communications, L.L.C.

John M. Dolan, President  
NorthCoast Communications, L.L.C.  
80 Baylis Road  
Melville, New York 11747  
Telephone: (631) 592-7700  
Facsimile: (631) 592-7777

With a copy (which shall not constitute  
notice) to:

Theresa Z. Cavanaugh  
Cole, Raywid & Braverman, LLP  
1919 Pennsylvania Avenue, NW  
Suite 200  
Washington, DC 20006  
Telephone: (202) 659-9750  
Facsimile: (202) 452-0067

SVC Bidco, L.P.

SVC Bidco, L.P.  
6511 Griffith Road  
Laytonsville, MD 20882  
Telephone: (301) 540-6222  
Facsimile: (301) 540-7930  
Attention: Shelley L. Spencer  
General Partner  
AirGate Wireless, L.L.C.

With a copy (which shall not constitute  
notice) to:

Janet Fitzpatrick Moran  
Patton Boggs LLP  
2550 M Street, N.W.  
Washington, D.C. 20037  
Telephone: (202) 457-5668  
Facsimile: (202) 457-6315

Salmon PCS, LLC

George D. Crowley, Jr.  
Chairman and Chief Executive Officer  
Two Wisconsin Circle,  
Suite 850  
Chevy Chase, MD 20815  
Telephone: (301) 913-0409  
Facsimile: (301) 913 - 0414

With a copy (which shall not constitute  
Notice) to:

Carl Northrop  
Paul, Hastings, Janofsky & Walker LLP  
1299 Pennsylvania Avenue, NW  
10th Floor  
Washington, DC 20004  
Telephone: (202) 508-9570  
Facsimile: (202) 508 - 8570

VoiceStream PCS BTA I License Corporation

VoiceStream Wireless Corporation  
Cregg B. Baumbaugh  
Executive Vice President  
Finance, Strategy & Development  
12920 SE 38th Street  
Bellevue, WA 98006  
Telephone: (425) 378-5007  
Facsimile: (425) 378-6390

With a copy (which shall not constitute  
notice) to:

VoiceStream Wireless Corporation  
Brian T. O'Connor  
Vice President  
Legislative & Regulatory Affairs  
401 9th Street, NW  
Washington, DC 20004  
Telephone: (202) 654-5910  
Facsimile: (202) 654-5963

**SCHEDULE C1****Pending Matters**

1. Antigone/Devco's Application for Review (filed March 17, 1997)
2. Antigone/Devco's Application for Review (filed June 16, 1997)
3. NextWave's Opposition to Antigone/Devco's Application for Review (filed April 1, 1997)
4. NextWave's Petition for Temporary Waiver of the Foreign Ownership Limitations of Section 310(b) of the Communications Act of 1934 as Amended (filed April 10, 1997)
5. Antigone/Devco's Reply to NextWave's Opposition to Application for Review (filed April 11, 1997)
6. Antigone/Devco's Opposition to NextWave's Petition for Temporary Waiver of the Foreign Ownership Limitations Section 310(b) of the Communications Act of 1934 as Amended (filed April 23, 1997)
7. NextWave's Reply to Antigone/Devco's Opposition to Petition for Temporary Waiver of the Foreign Ownership Limitations Section 310(b) of the Communications Act of 1934 as Amended (filed April 30, 1997)
8. NextWave and Antigone/Devco's Settlement Request (filed June 1, 1998)
9. NextWave and Antigone/Devco's Settlement Request (filed April 29, 1999)
10. NextWave's Emergency Petition for Declaratory Ruling (filed June 6, 1997)
11. Antigone/Devco's Opposition to NextWave's Emergency Petition for Declaratory Ruling (filed June 19, 1997)
12. NextWave's Section 310(b) Compliance Demonstration and Petition for Declaratory Ruling (filed April 10, 1998)
13. Petitions of NextWave Personal Communications Inc. and NextWave Power Partners Inc. to Defer or, in the Alternative, to Condition Grant (filed Mar. 9, 2001)
14. Petitions of the Official Committee of Unsecured Creditors of NextWave Telecom Inc. and its Subsidiaries to Defer or, in the Alternative, to Condition Grant (filed Mar. 9, 2001)
15. Reply of NextWave Personal Communications Inc. and NextWave Power Partners Inc. to Oppositions to NextWave's Petition to Defer or, in the Alternative, to Condition Grant (filed Mar. 23, 2001)
16. Reply of the Official Committee of Unsecured Creditors of NextWave Telecom Inc. and its Subsidiaries to Oppositions to the Committee's Petition to Defer or, in the Alternative, to Condition Grant (filed Mar. 23, 2001)
17. Antigone/Devco's Request for Declaratory Ruling (filed September 26, 2001)

**SCHEDULE C2****Commission Filings**

1. Verizon's Supplemental Comments, Request for Permit-But-Disclose Ex Parte Procedures (filed April 24, 2001)
2. NextWave's Response to Verizon's Supplemental Comments and Requests (filed May 2, 2001)
3. Alaska Native Wireless/Verizon/VoiceStream's Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave to Hold C and F Block Licenses (filed July 19, 2001)
4. NextWave's Response to Alaska Native Wireless/Verizon/VoiceStream's Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave to Hold C and F Block Licenses (filed July 30, 2001)
5. Alaska Native Wireless/Verizon/VoiceStream's Reply to NextWave's Response to Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave to Hold C and F Block Licenses (filed August 14, 2001)
6. Alaska Native Wireless/VoiceStream's Petition to Deny Reinstatement of Licenses (filed August 30, 2001)
7. NextWave's Motion for Extension of Time to File Response to Alaska Native Wireless/VoiceStream's Petition to Deny Reinstatement of Licenses (filed September 12, 2001)
8. NextWave's Response to Alaska Native Wireless/VoiceStream's Petition to Deny Reinstatement of Licenses (filed September 14, 2001)
9. Alaska Native Wireless/VoiceStream's Motion for Extension of Time to File Reply to NextWave's Response to Petition to Deny Reinstatement of Licenses (filed September 19, 2001)
10. Alaska Native Wireless/VoiceStream's Petition for Reconsideration (filed October 1, 2001)
11. Alaska Native Wireless/VoiceStream's Motion for Further Extension of Time to File Reply to NextWave's Response to Petition to Deny Reinstatement of Licenses (filed October 5, 2001)
12. Alaska Native Wireless/VoiceStream's Reply to NextWave's Response to Petition to Deny Reinstatement of Licenses (filed October 22, 2001)

## EXHIBIT A: LEGISLATION

## SEC. . SETTLEMENT OF LITIGATION AND PROMPT UTILIZATION OF WIRELESS SPECTRUM.

## (a) Resolution of Litigation. –

(1) Approval of Settlement. – Congress hereby authorizes and approves the decision by the Federal Communications Commission and the United States Department of Justice to settle the case entitled *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc.* (“petitioners”) v. *Federal Communications Commission and the United States of America* (“respondents”), D.C. Cir. Nos. 00-1402 and 00-1403, petitions for cert. filed, Nos. 01-653, et al. (Oct. 19, 2001), and their claims in the case entitled *In re NextWave Personal Communications, Inc.*, Bankr. S.D.N.Y. No. 98 B 21529, in accordance with the terms of the Settlement Agreement, dated November 15, 2001, that has been entered into by petitioners and respondents, among others.

(2) Authorization. – There are hereby authorized to be appropriated \$9.55 billion, to remain available until expended, to carry out the purposes of this subsection.

(3) Appropriation. – There is appropriated to the Federal Communications Commission, out of any money in the Treasury not otherwise appropriated, the sum of \$9.55 billion, to remain available until expended, to carry out the purposes of this subsection.

(4) Payment Obligation. – In accordance with the terms of the Agreement, subject to the conditions set forth therein (including the condition that the Final Bankruptcy Settlement Approval Date shall have occurred, on or before December 31, 2002), and in consideration for NextWave’s complete relinquishment of any and all claims related to the Designated Licenses or the Covered Spectrum, the Federal Communications Commission shall pay to or on behalf of NextWave the sum of \$9.55 billion no later than December 31, 2002. The Federal Communications Commission will make a \$6.498 billion payment directly to NextWave and will make a \$3.052 billion non-refundable advance tax payment on behalf of and for the benefit of NextWave for the Taxable Period. This advance payment of \$3.052 billion can be used by NextWave only toward satisfaction of its federal income tax liability for the Taxable Period and not on a subsequent claim for refund; and it cannot be carried forward or carried back to any other tax period and is not available for use or tax benefit in any year other than the Taxable Period. Notwithstanding any other provision of law, the United States is authorized and directed to retain all of NextWave’s advance payment, irrespective of the total federal income tax liability of NextWave.

(5) NextWave Relinquishment of Claims – In accordance with the terms of the Agreement, on or before the tenth (10th) Business Day after the Final Bankruptcy

Settlement Approval Date occurs, NextWave shall completely relinquish any and all claims related to the Designated Licenses and the Covered Spectrum.

(6) NextWave Tax Liability – NextWave shall pay to the Internal Revenue Service its full and complete tax liability with respect to the transaction that is the subject of the Agreement. Nothing in this section is to be construed as determining NextWave's federal tax liability for the Taxable Period or any other tax year, and nothing in this section restricts the Internal Revenue Service's rights to determine NextWave's federal income tax liability for the Taxable Period or any other tax year. Payment of its full and complete tax liability shall not permit NextWave to avoid payment to the United States of any other amounts it is obligated to pay the United States pursuant to the terms of the Agreement or otherwise.

(7) Paygo Provision – Notwithstanding Rule 3 of the Budget Scorekeeping Guidelines set forth in the Joint Explanatory Statement of the Committee of Conference accompanying Conference Report No. 105-217, legislation in this section that would have been estimated as changing direct spending or receipts under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 were it included in an Act other than an appropriations Act shall be treated as direct spending or receipts legislation, as appropriate, under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) Implementation of Auction 35. –

(1) Disposition of License Applications. – Notwithstanding any other provision of Federal, State, or local law, the Commission shall grant Auction 35 Licenses to each Participating Auction 35 Winning Bidder that the Commission determines is qualified to hold the licenses. Any such grant of licenses pursuant to this subsection shall be subsequent to the Final Bankruptcy Settlement Approval Date, and shall be governed by the terms of Auction 35 and the Rules of the Commission, except insofar as those terms and Rules of the Commission are modified by this section or by the terms of the Agreement.

(2) Withdrawal of Bids. – Any Auction 35 Winning Bidder whose total winning bids for Auction 35 Licenses did not exceed \$10 million may elect to withdraw all of its bids for such Auction 35 Licenses without penalty and shall be entitled to a refund of its monies on deposit with the FCC associated with such Auction 35 Licenses, provided that such a winning bidder that elects to withdraw its bids must file with the Commission no later than January 30, 2002, a notice of election to withdraw accompanied by a waiver and release, acceptable to the Commission, of all rights and claims relating to such Auction 35 Licenses, Auction 35, or the Agreement. Nothing in this section shall be construed to permit any Auction 35 Winning Bidder to withdraw some, but not all, of its bids for Auction 35 Licenses.

(3) Letters of Credit and Partial Return of Certain Amounts on Deposit. – A Participating Auction 35 Winning Bidder that provides letters of credit to the United States in accordance with the terms of the Agreement shall be entitled to a refund totaling

50 percent of its Auction 35 Deposits for winning bids for Auction 35 Licenses submitted by that Auction 35 Winning Bidder. The Commission shall pay such refund upon instructions from the payor of record, in accordance with and within the time prescribed in the Agreement. Nothing in this paragraph shall prevent the United States from recouping the value of the refunded deposits at a later time, to the extent authorized by the Agreement.

(4) Non-Participating Auction 35 Winning Bidders. – Except as provided in paragraph (2) of this subsection, any Auction 35 Winning Bidder that is not a Participating Auction 35 Winning Bidder shall remain subject to the full terms of Auction 35, including but not limited to all payment and default obligations.

(5) Payment by Participating Auction 35 Winning Bidders. – In accordance with the terms of the Agreement, subject to the conditions set forth therein (including the condition that the Final Bankruptcy Settlement Approval Date shall have occurred, on or before December 31, 2002), and subject to paragraph (6) of this subsection, any Participating Auction 35 Winning Bidder that the Commission determines is qualified to hold any license or licenses bid on in Auction 35 shall pay the Amount Due on Receipt for each Auction 35 License with respect to which the Commission has made such determination, as specified and by the time provided in the Agreement, and, in exchange, shall receive all such licenses.

(6) Early Payment. – Any Participating Auction 35 Winning Bidder may choose, in accordance with the terms of the Agreement, to make earlier payment for, and in exchange receive at the time of payment, all Auction 35 Licenses that the Commission is prepared to grant to it.

(7) Qualification Requirements. – In the event the Commission determines that any Auction 35 Winning Bidder is not qualified, under the Rules of the Commission or the Communications Act, to hold an Auction 35 License for which it submitted the winning bid, that Auction 35 Winning Bidder remains subject (i) to the Rules of the Commission that would apply in the absence of the Agreement, including without limitation any and all payment and default obligations and refund rights, and (ii) to the Agreement.

(8) Refunds for Participating Auction 35 Winning Bidders. - In accordance with the terms of the Agreement, a Participating Auction 35 Winning Bidder that has previously been granted Auction 35 Licenses shall be entitled to receive from the Commission, and the Commission shall pay from the budget accounts that received the payments from such bidder, a refund of amounts previously paid by such bidder for such Auction 35 Licenses as follows:

(A) any and all Amounts Due on Receipt previously paid by such Auction 35 Winning Bidder, if an order is entered by any court in a proceeding under subsection (c) that denies or has the legal effect of denying a participating Auction 35 Winning Bidder's right to use the spectrum covered by one or more Auction 35 Licenses that were previously granted to such participating Auction

35 Winning Bidder, subject to the provisions set forth in the Agreement with respect to repayment on restoration of rights; and, if applicable,

(B) any and all Amounts Due on Receipt and Auction 35 Deposits previously paid by, and not previously refunded to, such Auction 35 Winning Bidder for such licenses, under the following circumstances:

(i) if an order entered by any court in a proceeding under subsection (c) is in effect on or after December 31, 2002, that denies or has the legal effect of denying a Participating Auction 35 Winning Bidder's right to use the spectrum covered by one or more Auction 35 Licenses that were previously granted to such Participating Auction 35 Winning Bidder;

(ii) if a Final court order precludes or has the legal effect of precluding the Commission from paying all or part of the amounts set forth in subsection (a); or

(iii) if, on December 31, 2002, the Commission has not released an order with respect to one or more Auction 35 Licenses for which a Participating Auction 35 Winning Bidder submitted the winning bids determining either that the Commission is prepared to grant such Auction 35 License or that such Participating Auction 35 Winning Bidder is not qualified to hold such Auction 35 License.

Nothing in this section shall be construed to expand or limit any right to a refund set forth in the Agreement.

(c) Judicial Review. –

(1) Exclusive Review. – Subject to the limitations and preclusions in subsection (d), any proceeding for review within the scope of this subsection may be brought only in the United States Court of Appeals for the District of Columbia Circuit, which shall have sole and exclusive jurisdiction over any such proceeding.

(A) Any (i) appeal of an order disposing of the Motion for Approval of a Compromise of a Controversy filed by NextWave in accordance with the terms of the Agreement, or (ii) petition seeking judicial review of the procedures provided by this section for the resolution of issues presented by that Motion, shall be commenced by the filing of a "Notice of Expedited Appeal" or "Notice of Expedited Petition," as appropriate, which shall include a reference to the review provisions of this section, within 10 days after entry of the order disposing of the NextWave Motion for Approval referenced in this subparagraph. Nothing in this section shall affect the standard of review or substantive law applicable in any such proceeding. Except in a proceeding under this subparagraph, no court shall

have jurisdiction to consider any issue that could have been raised in a proceeding filed under this subparagraph.

(B) Any petition seeking judicial review of an order of the Commission approving the Agreement shall be commenced by the filing of a "Petition for Expedited Review," which shall include a reference to the review provisions of this section, within 10 days after the later of (i) the date on which public notice is given of the Commission order, or (ii) the effective date of this section.

(C) Any challenge to any aspect of the constitutionality of this section, except for a challenge that must be brought pursuant to subparagraph (A) of this paragraph, shall be commenced by the filing of a "Petition for Expedited Review," which shall include a reference to the review provisions of this section, within 10 days after the effective date of this section.

(2) Expedited Treatment. – The Court of Appeals shall advance on its docket any and all proceedings brought under paragraph (1) of this subsection and shall expedite them to the greatest extent possible, with a view to deciding the cases within 55 days after the filing of the last timely filed petition or notice of appeal if practicable. These expedited procedures shall apply to all such cases, including those that are before the Court following any remand to the Commission or to the lower court with jurisdiction over further proceedings related to the Motion for Approval of a Compromise of a Controversy filed by NextWave in accordance with the terms of the Agreement. Any petition for rehearing or rehearing en banc of an order by the Court of Appeals in a case under paragraph (1) of this subsection shall be filed within 10 days after the entry of judgment. The Court of Appeals shall expedite its consideration of any such petition to the greatest extent possible, with a view to resolving the petition within 20 days after such a petition is filed if practicable.

(3) Certiorari. – Any petition for a writ of certiorari seeking review by the Supreme Court of the United States of a judgment or order by the Court of Appeals under this subsection shall be filed within 10 days after the entry of judgment or order. Any opposition shall be filed within 10 days after filing of the petition. The Supreme Court shall advance any such petition on its docket and expedite its consideration of the petition to the greatest extent possible, with a view to acting on the petition within 30 days after it is filed if practicable. In the event the petition is granted, the Supreme Court shall expedite consideration to the greatest extent possible, with a view to issuing an order within 70 days of the grant of the writ of certiorari if practicable.

(4) Limits on Interlocutory Relief Affecting Licenses. – In adjudicating matters arising under subparagraph (1)(B) or (C) of this subsection, no court shall have jurisdiction to enter an order that would require an Auction 35 Winning Bidder to surrender or relinquish an Auction 35 License, or that would deny or have the legal effect of denying a licensee's right to use the spectrum covered by such a License, due to the invalidity of the Agreement, of a Commission order approving the Agreement, or of this section, at any time before there is a final judgment in that action that is no longer subject to further review.

(5) Exclusion of Bidder-Specific Litigation And Enforcement Proceedings. – The following proceedings shall be excluded from the scope of this subsection:

(A) Any proceeding seeking judicial review of any Commission decision or order specific to an Auction 35 Winning Bidder's license application – including, but not limited to, a proceeding pursuant to subparagraph (A) or (B) of subsection (d)(1) concerning the bidder's qualifications to hold a license; and

(B) Any proceeding to enforce the terms of the Agreement, including, but not limited to, a proceeding pursuant to subparagraph (C) of subsection (d)(1).

(6) Limitation on Jurisdiction. – Except in a proceeding filed under paragraph (1) of this subsection, no court shall have jurisdiction to consider any issue that could have been raised in an action filed under that paragraph.

(d) Limitation and Preclusion of Actions. –

(1) Neither the Agreement nor a Commission order approving the Agreement, granting a license, or taking any other action pursuant to this section or to the Agreement, shall be subject to administrative or judicial review, except that

(A) administrative and judicial review of a Commission decision disposing of any petition to deny applications of an Auction 35 Winning Bidder, which petition was timely filed on or before March 9, 2001 in accordance with the requirements of 47 C.F.R. section 1.2108(b) and "C and F Block Broadband PCS Auction: Applications Accepted For Filing," Public Notice, DA 01-520 (released Feb. 27, 2001), is not precluded;

(B) administrative and judicial review of a Commission decision determining that an Auction 35 Winning Bidder is not qualified to hold a license, initiated by that Auction 35 Winning Bidder, is not precluded;

(C) any party to the Agreement may initiate a proceeding to enforce the terms of the Agreement;

(D) subject to subparagraph (c)(1)(A), this section does not affect jurisdiction to rule on a Motion for Approval of a Compromise of a Controversy filed by NextWave in accordance with the terms of the Agreement; and

(E) this section, the Agreement, and any Commission order approving the Agreement, shall be subject to review solely for constitutionality, which review shall be solely by the United States Court of Appeals for the District of Columbia Circuit, and solely as provided in subparagraphs (c)(1)(A), (B), and (C).

(2) No Court shall have jurisdiction to enjoin the United States or the Commission from exercising its rights to draw on the letters of credit that have been provided by a Participating Auction 35 Winning Bidder in accordance with the terms of the Agreement.

(3) Nothing in this subsection affects the Commission's jurisdiction or authority, consistent with the Communications Act, the Rules of the Commission, and the Agreement, to withdraw authorization to use spectrum or enforce license conditions applicable to the affected spectrum. Except as otherwise provided in this section or the Agreement, Auction 35 Winning Bidders remain subject to the Rules of the Commission and the Communications Act.

(e) Frivolous actions. – Any person who files an action in derogation of limitations or deadlines set forth in subsections (c) and (d), or who is found to have acted without substantial justification in filing such action, shall be subject to sanctions under section 1927 of title 28, and Rule 11 of the Federal Rules of Civil Procedure.

(f) Definitions. – As used in this section,

(1) "Agreement" means the Settlement Agreement dated November 15, 2001, entered into by NextWave and the Federal Communications Commission, the United States, and Participating Auction 35 Winning Bidders.

(2) "Amount Due on Receipt" means the amount equal to the balance due to the FCC, under the Rules of the Commission, as of the applicable payment date under the Agreement for an Auction 35 License. The Amount Due on Receipt for an Auction 35 License does not include the Auction 35 Deposit for such License.

(3) "Auction 35" means the FCC-conducted spectrum auction number 35 that commenced on December 12, 2000, for Personal Communications Services licenses to operate Covered Spectrum and other spectrum.

(4) "Auction 35 Deposit" means any monies on deposit with the FCC paid by a Participating Auction 35 Winning Bidder for an Auction 35 License. The Auction 35 Deposit for an Auction 35 License does not include the Amount Due on Receipt for such License.

(5) "Auction 35 Licenses" means those licenses to use Covered Spectrum for which Auction 35 Winning Bidders submitted winning bids in Auction 35.

(6) "Auction 35 Winning Bidder" means those entities that submitted winning bids in Auction 35 for Covered Spectrum.

(7) "Bankruptcy Settlement Approval Order" means an order authorizing and directing NextWave to enter into the transactions contemplated in the Agreement on the terms specified therein, to relinquish any and all claims to the Covered Spectrum and the Designated Licenses, and to return the Designated Licenses to the Commission in exchange for the payments provided in the Agreement.

(8) "Business Day" means any day, other than Saturday or Sunday, on which commercial banks in New York City and the Commission's offices are open for the general transaction of business.

- (9) "Commission" means the Federal Communications Commission.
- (10) "Communications Act" means the Communications Act of 1934, as amended.
- (11) "Covered Spectrum" means spectrum that NextWave had been authorized to use under the Designated Licenses.
- (12) "Days" means calendar days, including weekends and holidays.
- (13) "Designated Licenses" means the C Block and F Block licenses for which NextWave was the winning bidder at auctions concluded in 1996 and 1997 by the Commission under section 309(j) of the Communications Act.
- (14) "Final" means with respect to any order that such an order has not been reversed, modified or stayed and (x) the time to appeal such order has expired and no appeal or petition for review, rehearing or certiorari is pending, or (y) any appeal has been fully decided and no further appeal or petition for review, rehearing or certiorari can be timely taken or granted.
- (15) "Final Bankruptcy Settlement Approval Date" means the date on which all of the following conditions have been satisfied: (i) the Bankruptcy Settlement Approval Order has become Final; (ii) any proceeding pursuant to subparagraph (1)(A) of subsection (c) has been resolved by an order that has become Final; and (iii) either Verizon Wireless has caused letters of credit to be issued in accordance with the terms of the Agreement, or, in the absence of the required letters of credit, the United States has not, within the time provided by the Agreement, exercised its right to terminate the Agreement.
- (16) "NextWave" means NextWave Personal Communications Inc. and its affiliates, NextWave Telecom Inc., NextWave Partners Inc., NextWave Power Partners Inc., and NextWave Wireless Inc.
- (17) "Participating Auction 35 Winning Bidder" means an Auction 35 Winning Bidder that is a party to the Agreement on January 10, 2002, provided that any Auction 35 Winning Bidder whose total winning bids for Auction 35 Licenses did not exceed \$10 million may become a party by executing the Agreement no later than January 30, 2002.
- (18) "Rules of the Commission" means any and all rules, regulations, policies, procedures, public notices and orders of the Commission that are in effect at the time an action, event or matter in question occurs.
- (19) "Taxable Period" means the tax period in which NextWave relinquishes any and all claims related to the Designated Licenses and the Covered Spectrum, as provided in paragraph (5) of subsection (a).

(g) Effective Date. – This section shall be effective on the date of enactment and the provisions contained in this section shall supersede any other Federal law, or State or local law, to the contrary.

(h) Severability. - If a provision of this Section is held invalid, all valid provisions that are severable from the invalid provision shall remain in effect.

**EXHIBIT B - FORM OF LETTER OF CREDIT**

**[Illustrative Form of Letter of Credit --  
Subject to Issuing Bank Requirements]**

No. \_\_\_\_\_

\_\_\_\_\_, 2002

THE FEDERAL COMMUNICATIONS COMMISSION

[Address]

Ladies and Gentlemen:

We hereby establish, at the request and for the account of \_\_\_\_\_, in your favor, as required under the Settlement Agreement dated as of November 15, 2001 (the "Agreement") by and among NextWave Personal Communications Inc., et al., the United States, the Federal Communications Commission, and certain winning bidders in the FCC's spectrum auction number 35 including [name of bidder], our Irrevocable Letter of Credit No. \_\_\_\_\_, in the amount of \$ \_\_\_\_\_, expiring at the close of banking business at our office described in the following paragraph, on December 31, 2002, or such earlier date as the Letter of Credit is terminated (the "Expiration Date").

Funds under this Letter of Credit are available to you against your draft in the form attached hereto as Annex A, drawn on our office described below, and referring thereon to the number of this Letter of Credit, accompanied by your written and completed certificate signed by you substantially in the form of Annex B attached hereto. Such draft and certificate shall be dated the date of presentation, which shall be made at our office located at [BANK ADDRESS] and shall be effected either by personal delivery or delivery by a nationally recognized overnight delivery service. We hereby commit and agree to accept your draft and certificate at such office, and if they are all in strict conformity with the terms and conditions of this Letter of Credit, on or prior to the Expiration Date, we will honor the same not later than the third banking day after presentation thereof in accordance with your payment instructions. Payment under this Letter of Credit shall be made by wire transfer of Federal Reserve Bank of New York funds to your account at the United States Treasury, in accordance with the instructions set forth in a draft presented in connection with a draw under this Letter of Credit.

Partial drawings are permitted under this Letter of Credit.

This Letter of Credit shall be canceled and terminated upon receipt by us of Applicant's certificate purportedly signed by an authorized representative of [name of bidder], and countersigned by an authorized signatory of the FCC in the form attached as Annex C.

The amount of this Letter of Credit shall be reduced upon receipt by us of Applicant's certificate purportedly signed by an authorized representative of [name of bidder], and countersigned by an authorized signatory of the FCC in the form attached as Annex D.

This Letter of Credit is not transferable or assignable in whole or in part.

This Letter of Credit sets forth in full the undertaking of the Issuer, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein, except only the certificates and the drafts referred to herein and the ISP (as defined below); and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for such certificates and such drafts and the ISP.

This Letter of Credit shall be governed by, and construed in accordance with, the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 (the "ISP"), which is incorporated into the text of this Letter of Credit by this reference, and, to the extent not inconsistent therewith, the laws of the State of New York, including the Uniform Commercial Code as in effect in the State of New York. Communications with respect to this Letter of Credit shall be addressed to us at our address set forth below, specifically referring to the number of this Letter of Credit.

[NAME OF BANK]

[BANK SIGNATURE]

ANNEX A  
OF EXHIBIT B

Form of Draft

To: [Issuing Bank]

DRAWN ON LETTER OF CREDIT No: \_\_\_\_\_

AT SIGHT

PAY TO THE ORDER OF THE FEDERAL COMMUNICATIONS  
COMMISSION BY WIRE TRANSFER OF FEDERAL RESERVE BANK OF  
NEW YORK

FUNDS TO: U.S. TREASURY  
ABA NUMBER 021030004  
TREAS NYC/CTR  
BNF: 27000001  
OBI: Credit U.S. Treasury  
Account (FCC Subaccount 27X4133)

AS AUCTION 35 PAYMENTS

[AMOUNT IN WORDS] DOLLARS AND NO/CENTS

\$(AMOUNT IN NUMBERS)

FEDERAL COMMUNICATIONS COMMISSION

By: \_\_\_\_\_

ANNEX B  
OF EXHIBIT B

Draw Certificate

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the United States and (b) Section 11 of the Settlement Agreement, dated as of November \_\_, 2001, by and among NextWave Personal Communications Inc., et al., the United States, the Federal Communications Commission ("FCC"), and certain winning bidders in the FCC's spectrum auction number 35, including [name of bidder] (the "LC Provider") (all capitalized terms used herein but not defined herein having the meaning stated in the Agreement), that:

i. The LC Provider did not make a payment to the FCC in the amount of \$ \_\_\_\_ pursuant to the terms of Sections 16 and 17 of the Settlement Agreement on or before the Payment Date applicable to such payment;

ii. At least three (3) days have passed since the Payment Date for such payment; and

iii. The LC Provider has not paid to the FCC the amount specified in Clause (i) above.

iv. The amount to be drawn under this Letter of Credit as of the date hereof is \$ \_\_\_\_, [which equals (a) the amount specified in the notice described in Clause (i) above multiplied by (b) an amount equal to (A) the initial amount of this Letter of Credit divided by (B) the total initial amount of all Letters of Credit provided by such LC Provider.] [NOTE: If the LC Provider fails to provide the notice required by Section 11(a)(v) of the Agreement, the above-bracketed language shall be deleted and replaced with the following: [which equals the amount specified in clause (i), less the aggregate amounts drawn under all other Letters of Credit provided by the LC Provider in connection with the defaulted payment described in clause (i).]]

IN WITNESS WHEREOF, the undersigned has executed this certificate as of [specify time of day] on the \_\_\_\_ day of \_\_\_\_\_, 2002.

FEDERAL COMMUNICATIONS COMMISSION

By: \_\_\_\_\_  
Name:  
Title:

ANNEX C  
OF EXHIBIT B

Certificate Regarding Termination of Letter of Credit

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the United States, and (b) Section 11 of the Settlement Agreement, dated as of November \_\_, 2001, by and among NextWave Personal Communications Inc., et al., the United States, the Federal Communications Commission ("FCC"), and certain winning bidders in the FCC's spectrum auction number 35, including [name of bidder] (the "LC Provider") (all capitalized terms used herein but not defined herein having the meaning stated or described in the Agreement), that:

(1) [include one of the following clauses, as applicable]

(a) The Settlement Agreement has terminated in accordance with the provisions thereof;

(b) The LC Provider has paid to the FCC all amounts it is required to pay under Section 17 of the Settlement Agreement;

(c) A court of competent jurisdiction has entered an order that is Final, which has the effect of preventing the FCC from granting to the LC Provider its Auction 35 Licenses; or

(d) The United States and the Commission have accepted Alternative Security Arrangements.

(2) By reason of the event or circumstance described in paragraph (1) of this certificate, and effective upon the receipt by the Bank of this certificate (countersigned as set forth below), the Letter of Credit is terminated.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the \_\_\_\_ day of \_\_\_\_\_, 2002.

[NAME OF BIDDER]

By: \_\_\_\_\_  
Name:  
Title:

COUNTERSIGNED:  
Federal Communications Commission

By: \_\_\_\_\_  
Name:  
Its Authorized Signatory

ANNEX D  
OF EXHIBIT B

Certificate Regarding Reduction of Letter of Credit Amount

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the United States, and (b) Section 11 of the Settlement Agreement, dated as of November \_\_, 2001, by and among NextWave Personal Communications Inc., et al., the United States, the Federal Communications Commission ("FCC"), and certain winning bidders in the FCC's spectrum auction number 35, including [name of bidder] (the "LC Provider") (all capitalized terms used herein but not defined herein having the meaning stated or described in the Agreement), that:

i. The LC Provider has paid to the FCC the sum of \$\_\_\_\_\_, representing an amount equal to the Amounts Due on Receipt paid for Auction 35 Licenses that were paid for and granted to such LC Provider in respect of which there have been no prior reductions of the amount of the Letter of Credit;

ii. The amount of the Letter of Credit shall be reduced by \$\_\_\_\_\_, which equals (a) the amount described in Clause (i) multiplied by (b) an amount equal to (A) the initial amount of the Letter of Credit divided by (B) the total initial amount of all Letters of Credit provided by such LC Provider; and

iii. After giving effect to the reduction, the amount of the Letter of Credit shall be \$\_\_\_\_\_ [insert amount of the Letter of Credit prior to reduction minus the amount specified in Clause (ii)].

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the \_\_\_\_ day of \_\_\_\_\_, 2002.

[NAME OF BIDDER]

By: \_\_\_\_\_  
Name:  
Title:

COUNTERSIGNED:

Federal Communications Commission

By: \_\_\_\_\_  
Name:  
Its Authorized Signatory

**EXHIBIT C**

**TO BE SUBSTITUTED UPON EXECUTION BY NEXTWAVE AND THE INTERNAL  
REVENUE SERVICE**

ORAL ARGUMENT IS SCHEDULED FOR MARCH 15, 2001

IN THE  
**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**  
**Docket Nos. 00-1402 and 00-1403 (consolidated)**

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NEXTWAVE PERSONAL COMMUNICATIONS INC.  
and NEXTWAVE POWER PARTNERS INC.,  
*Appellants/Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and the  
UNITED STATES OF AMERICA,  
*Appellees/Respondents.*

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**ON APPEAL FROM, AND PETITION FOR REVIEW OF, ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION**

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**AMICUS CURIAE BRIEF OF SENATOR ROBERT G. TORRICELLI,  
SENATOR CHARLES E. SCHUMER, REPRESENTATIVE JOHN CONYERS,  
JR., REPRESENTATIVE JARROLD NADLER, REPRESENTATIVE LINDSEY  
GRAHAM, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF  
NEXTWAVE PERSONAL COMMUNICATIONS INC., D&P NEXTWAVE  
PARTNERS, L.P., AND PROFESSOR KENNETH N. KLEE IN SUPPORT OF  
APPELLANTS/PETITIONERS**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**I. Parties:**

This matter involves review of an order of the Federal Communications Commission. The Appellants/Petitioners are NextWave Personal Communications Inc. and NextWave Power Partners Inc. The Appellees/Respondents are the Federal Communications Commission and the United States of America. Senator Robert G. Torricelli, Senator Charles E. Schumer, Representative John Conyers, Jr., Representative Jarrold Nadler, Representative Lindsey Graham, The Official Committee of Unsecured Creditors of Appellant, Creditor D&P NextWave Partners, L.P., and Professor Kenneth N. Klee have filed in conjunction with this brief a Motion for Leave to Participate as Amicus Curiae.

**II. Rulings:**

This matter involves review of the Federal Communications Commission's order styled *In the Matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications Inc. and NextWave Power Partners Inc. Petition for Reconsideration*, File Nos. 00341CWL96, et. al. (Sept. 6, 2000), available at 2000 WL 1262652 (statement issued by Commissioner Furchtgott-Roth). This matter also involves review of the decision of the FCC that NextWave's licenses for personal communications services spectrum have purportedly cancelled pursuant to 47 C.F.R. § 1.2110(f)(4). See *Auction of C and F Block Broadband PCS Licenses*, Public Notice, 15 F.C.C.R. 693 (2000).

**III. Related Cases:**

A related case is *In re Federal Communications Commission*, 217 F.3d 125 (2d Cir. 2000), *cert. denied*, No. 00-447, 2000 WL 1377133 (U.S. Nov. 27, 2000). See also *FCC v. NextWave Personal Communications Inc.*, 208 F.3d 43 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 298 (2000), *reh'g denied*, No. 99-1980, 2000 WL 17377481 (U.S. Nov. 27, 2000) (involving the same parties).

This matter was previously before the Court. See *NextWave Personal Communications Inc. v. FCC*, Nos. 00-1045 and 00-1046. The Court dismissed those cases as premature in light of NextWave's then-pending petition for reconsideration with the FCC, which petition has since been resolved. See *NextWave Personal Communications Inc. v. FCC*, 2000 WL 1093322 (D.C. Cir. June 22, 2000).

**CORPORATE DISCLOSURE STATEMENT**

Amicus D&P NextWave Partners L.P. is privately held and has not issued shares to the public. Amicus Official Committee of Unsecured Creditors is a committee appointed by the bankruptcy court to represent the interests of NextWave's general unsecured creditors and has not issued shares to the public.

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**Statement of Interest of Amici Curiae**

Senators Robert G. Torricelli (NJ) and Charles E. Schumer (NY) are members of the United States Senate interested in matters pertaining to the administration of the Bankruptcy Code.<sup>1/</sup> Representatives John Conyers, Jr. (MI), Jerrold Nadler (NY), and Lindsey Graham (SC) are members of the United States House of Representatives likewise interested in matters pertaining to the administration of the nation's bankruptcy laws.<sup>2/</sup> The undersigned Senators and Representatives join in opposition to the FCC's contention that it is exempt from the provisions of the Code that restrain the agency from canceling the licenses of NextWave Personal Communications Inc. and its co-debtor affiliates (collectively, "NextWave") on the basis that NextWave did not make an interest payment to the agency during the course of its chapter 11 case. On prior occasions, Congress has declined the FCC's request for such an exemption, and, in fact, no such exemption exists under

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<sup>1/</sup>Senator Torricelli is a member of the Senate Committee on the Judiciary, and the ranking minority member of the Administrative Oversight and the Courts Subcommittee, which oversees bankruptcy matters. Senator Schumer is also a member of the Senate Committee on the Judiciary and likewise the Administrative Oversight and the Courts Subcommittee. The provisions of the Bankruptcy Code are codified at 11 U.S.C. § 101, *et seq.*

<sup>2/</sup>Representative Conyers is the ranking minority member of the House Committee on the Judiciary. Representative Nadler is a member of the House Committee on the Judiciary and the ranking minority member of the Commercial Administrative law Subcommittee, which oversees bankruptcy matters. Representative Graham is a member of the House Committee on the Judiciary.

the current law.<sup>2</sup> The undersigned Senators and Representatives are especially interested in this case because a federal agency has acted arbitrarily to impose an extremely harsh sanction in clear violation of applicable provisions of the Bankruptcy Code. The undersigned Senators and Representatives therefore urge the Court to set aside the agency's cancellation of NextWave's licenses and vindicate principles of policy and law that are critical to the successful operation of the nation's bankruptcy system.

The undersigned Official Committee of Unsecured Creditors (the "Committee") is the official representative of the thousands of innocent businesses and investors who extended hundreds of millions of dollars in services, goods, and financing to NextWave to enable NextWave to acquire its licenses, build out its network, and fund its operations.<sup>4</sup> The Committee has a vital interest in this matter because the creditors whom the Committee represents stand to lose hundreds of millions of dollars as a result of the

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<sup>2</sup>See *infra* note 21 (quoting recent letter explaining the consensus view of members of Congress that the FCC is not exempt from the application of the Bankruptcy Code).

<sup>4</sup>The Bankruptcy Code provides that, as soon as practicable after the commencement of a chapter 11 case, "the United States Trustee shall appoint a committee of unsecured creditors holding unsecured claims" against the chapter 11 debtor. 11 U.S.C. § 1102(a)(1). The Committee's function is to represent the interest of general unsecured creditors in the debtor's chapter 11 case. See *Advisory Comm. of Major Funding Corp. v. Sommers (In re Advisory Comm. of Major Funding Corp.)*, 109 F.3d 219, 224 (5<sup>th</sup> Cir. 1997); *In re Drexel Burnham Lambert Group*, 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992); see also 11 U.S.C. § 1103 (prescribing powers and duties of chapter 11

FCC's unwarranted cancellation of NextWave's licenses. Under applicable bankruptcy law, NextWave is entitled to retain its licenses and pay its debts in accordance with its proposed chapter 11 plan. Under its plan, NextWave proposes to pay in full not only the FCC's claim, but also each of the claims of the Committee's constituents (which claims exceed \$500 million). The Committee urges the Court to set aside the FCC's cancellation of NextWave's licenses so that NextWave may proceed to consummate its plan, emerge from bankruptcy, and pay all of its creditors in full.

The undersigned D&P NextWave Partners L.P. ("D&P") is NextWave's post-petition lender, and is not otherwise affiliated with NextWave.<sup>5/</sup> As the Bankruptcy Code permits, D&P made various loans to NextWave after NextWave commenced its chapter 11 case. In conjunction with this financing, D&P took liens on the proceeds of NextWave's licenses to secure repayment of its loans. As the Bankruptcy Code requires, NextWave and

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committees), § 1109(b) (granting committees the right to appear and be heard on any issue in a chapter 11 case).

<sup>5/</sup>After a debtor files for bankruptcy relief, the Bankruptcy Code authorizes the debtor (also known as the "debtor in possession" or "dip") to obtain "post-petition" financing to fund its operations while it seeks to reorganize. See 11 U.S.C. § 364; see also 11 U.S.C. § 1101 (identifying the "debtor in possession" in a chapter 11 case as the debtor), § 1107 (defining the rights and duties of a debtor in possession as including those of the trustee). The term "post-petition" refers simply to events, transactions, and occurrences that take place after a debtor files a petition for bankruptcy relief. Conversely, the term "pre-petition" refers simply to events, transactions, or occurrences transpiring before the filing of a bankruptcy petition. See *Boston & Maine Corp. v. Chicago Pac. Corp.*, 785 F.2d 562, 565-

D&P obtained the Bankruptcy Court's prior approval of these liens upon notice to the FCC. Significantly, the FCC never objected to D&P's liens on the ground that the licenses had cancelled (or could be cancelled) during the course of NextWave's bankruptcy case. In addition, D&P relied on the FCC's repeated statements that NextWave's licenses would not cancel while NextWave attempted to reorganize. Although the FCC now contends that the licenses cancelled during the case, this cancellation is contrary to applicable law. Accordingly, D&P also requests that the Court set aside the FCC's cancellation of NextWave's licenses in order to vindicate D&P's reliance and prevent unwarranted harm.

The undersigned Kenneth N. Klee is a Professor of Law active in the study and teaching of bankruptcy law.<sup>67</sup> Professor Klee joins this brief because of his grave concern over the FCC's conduct in this case and its impact on the administration of future cases. If the FCC may exempt itself from the provisions of the Bankruptcy Code, then so may other state and federal agencies in countless other bankruptcy proceedings. The result would be chaos in the administration of bankruptcy cases generally. Because enforcement of the Bankruptcy Code is critical to the smooth operation of the

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66 (7<sup>th</sup> Cir. 1986) (discussing the distinction between pre- and post-petition claims).

<sup>67</sup>Professor Kenneth N. Klee is an Acting Professor of Law at the University of California at Los Angeles School of Law.

nation's bankruptcy laws, Professor Klee joins in the request that the Court set aside the FCC's purported cancellation of NextWave's licenses.<sup>71</sup>

#### Preliminary Statement

The FCC's conduct in this case violates both the letter and spirit of the nation's bankruptcy laws, and if allowed to stand, would deal a serious blow to the administration of reorganization proceedings by permitting a governmental creditor to circumvent the bankruptcy process for its own self-interest and pecuniary gain at the expense of others who are no less deserving of payment. As the Supreme Court has explained, the twin purposes of the chapter 11 process are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999). In furtherance of these policies, NextWave has adhered to the requirements of the Bankruptcy Code and has filed a chapter 11 plan that provides for NextWave to retain its licenses, emerge from bankruptcy, and pay all of its debts in full, including its entire \$5 billion debt to the FCC (including accrued interest and fees). The FCC, however, has refused to accept full payment. Instead, the FCC contends that NextWave's licenses "cancelled" during the

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<sup>71</sup>Although the amici participating in this brief have differing interests, they all share the common goal of ensuring that the Bankruptcy Code is interpreted properly in this instance. This case involves a serious abuse of regulatory authority at odds with the clear provisions and policies of the nation's bankruptcy laws. Unless this abuse is corrected at this time, it may

course of NextWave's chapter 11 case solely because NextWave did not make an interest payment to the FCC during the course of the case.

The FCC's purported "cancellation" of NextWave's licenses is contrary to applicable statutory law. As is relevant here, the Bankruptcy Code proscribes the cancellation of NextWave's licenses during the course of NextWave's chapter 11 case in order to preserve the company as a viable business enterprise and likewise maximize the value of its assets to ensure the fair treatment of all creditors, including the FCC. In this case, if the FCC is permitted to carry out its cancellation of NextWave's licenses, the FCC will succeed in destroying NextWave as an operating business simply for the sake of the FCC's own institutional interests, and in the process render worthless the claims of thousands of NextWave's innocent creditors and investors.

Worse, the FCC's cancellation of NextWave's licenses is contrary to the agency's own repeated assurances that the licenses would enjoy the protections of the Bankruptcy Code and would not cancel during the course of NextWave's bankruptcy case. NextWave and its creditors relied on these assurances, and the FCC's abrupt reversal is arbitrary and capricious. Accordingly, the undersigned respectfully request that the Court set aside the FCC's cancellation so that NextWave may proceed to consummate its plan of reorganization, pay its creditors in full, and fulfill Congress' objectives in creating the chapter 11 process.

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serve as an unfortunate precedent that jeopardizes the administration of

**Background and Summary of Points**

On June 8, 1998, NextWave filed a petition for chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York. Thereafter, the FCC filed a claim in NextWave's bankruptcy case asserting a debt in excess of \$4 billion representing the amount that NextWave owes the FCC for the purchase of its licenses. The relevant dispute centers on the FCC's efforts to cancel NextWave's licenses and reacquire them to other carriers on the ground that NextWave did not make an interest payment to the FCC during the pendency of its bankruptcy case.

Once NextWave filed for bankruptcy relief, the Bankruptcy Code precluded NextWave from making payments to the FCC outside the context of a confirmed chapter 11 plan. As the Bankruptcy Code permits, NextWave filed a plan that provides for the payment in full of its entire debt to the FCC, including all interest and fees. The FCC, however, has refused to accept full payment. Instead, the FCC contends that NextWave's licenses cancelled automatically as a result of NextWave's alleged failure to make the interest payment in question.<sup>87</sup> As a result, the FCC now seeks to sell NextWave's

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future cases and places the certainty of the Bankruptcy Code at risk.

<sup>87</sup>The FCC bases its contention on 47 C.F.R. § 1.2110(f)(4)(iv), which provides: "Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such grace period is available, will be declared in default, its license will be automatically cancelled, and will be subject to debt collection procedures."

licenses to one or more third parties—an event that will cause NextWave and its creditors to suffer staggering, pointless losses.<sup>9f</sup>

The FCC’s purported revocation and imminent resale of NextWave’s licenses violates applicable bankruptcy law and is therefore invalid. First, section 362(a) of the Bankruptcy Code (the “automatic stay”) prevents creditors, including governmental agencies, from pursuing civil debt enforcement activities, including license revocation for unpaid obligations, during the course of a debtor’s bankruptcy case. See 11 U.S.C. § 362(a); see also H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297 (“All proceedings are stayed, including . . . license revocation.”). As the case law interpreting section 362(a) makes plain, actions taken in violation of the automatic stay are null and void. See *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9<sup>th</sup> Cir. 1992) (invalidating IRS assessment, and holding that “violations of the automatic stay are void”).<sup>10f</sup>

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<sup>9f</sup>The FCC scheduled the reauction of NextWave’s licenses for December 12, 2000. The auction process is currently ongoing.

<sup>10f</sup>See also *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372-73 (10<sup>th</sup> Cir. 1990); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11<sup>th</sup> Cir. 1982); *Garcia v. Phoenix Bond & Indemnity Co. (In re Garcia)*, 109 B.R. 335, 339-40 (N.D. Ill. 1989); *Richard v. City of Chicago*, 80 B.R. 451, 453 (N.D. Ill. 1987); *United States v. Coleman Am. Cos. (In re Coleman Am. Cos.)*, 26 B.R. 825, 831 (Bankr. D. Kan. 1983). In contrast, some courts have held that actions taken in violation of the automatic stay are voidable, rather than void. See *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5<sup>th</sup> Cir. 1989); *In re Oliver*, 38 B.R. 245, 248 (Bankr. D. Minn. 1984).

Accordingly, the FCC's purported cancellation of NextWave's licenses is invalid as a matter of federal law.<sup>117</sup>

Second, section 525(a) of the Bankruptcy Code commands that "a governmental unit may not . . . revoke . . . a license . . . solely because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). In this instance, NextWave's alleged failure to make an interest payment during the course of its bankruptcy case is the sole basis for the FCC's revocation of NextWave's licenses. Because the FCC's revocation violates the plain terms of section 525(a), it is again invalid as a matter of federal law.

Third, applicable bankruptcy law generally precludes interim distributions to creditors outside the context of a confirmed plan. In this case, NextWave followed the Bankruptcy Code's procedures for the payment of the FCC's claim. Under the Bankruptcy Code, section 1121(a) authorizes a chapter 11 debtor to file a plan of reorganization that provides for the disposition of the debtor's assets and the payment of claims. *See* 11 U.S.C. § 1121(a). In turn, section 1123 specifically authorizes the debtor in its plan to "cur[e] . . . any default" and "ret[ain] . . . all or any part of [its] property" in

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<sup>117</sup>Although the FCC bases the revocation of NextWave's licenses on one of its regulations, 47 C.F.R. § 1.2110(f)(4)(iv), it is clear that a regulation cannot override the command of a statute, including a provision of the Bankruptcy Code. *See United States v. Gordon*, 638 F.2d 886, 888 (5<sup>th</sup> Cir. 1981) (stating that "[w]hatever effect the agency regulation may have under other circumstances, it cannot supersede a statute").

exchange for the satisfaction of its obligations. 11 U.S.C. §§ 1123(a)(5)(A) & 1123(a)(5)(G); *see also* 11 U.S.C. §§ 1123(b)(5), 1124, 1141(b), 1141(c), & 1141(d). As these provisions make plain, NextWave is entitled to cure its alleged payment default to the FCC, pay its debt in full, and retain its licenses. Because the FCC's efforts to revoke and reauction the licenses stands in conflict with NextWave's rights and obligations under sections 1121(a) and 1123, the FCC's efforts are invalid as a matter of federal law.

In addition to these statutory violations, the FCC's revocation of NextWave's licenses should also be set aside because the FCC's actions in this case have been thoroughly capricious. During the course of NextWave's bankruptcy case, the FCC sat by silently while NextWave pledged various security interests in the proceeds of its licenses to obtain financing to fund the chapter 11 process. Worse, the FCC stated repeatedly during the course of NextWave's bankruptcy case that NextWave's ownership of its licenses were subject to the protections of the Bankruptcy Code and could not be cancelled while NextWave sought to reorganize. All parties in interest relied on these repeated statements, including NextWave, its creditors, and D&P. Having assured all of the parties that the licenses could not be cancelled, the FCC cannot now rescind the parties' reliance, and the FCC's conduct demonstrates the epitome of arbitrary agency action.

**I. The FCC's Purported Cancellation of NextWave's Licenses Violates the Policies and Text of Congress's Chapter 11 Scheme.**

In enacting chapter 11 of the Bankruptcy Code, Congress explained its underlying purpose in unmistakable terms: “The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.” H.R. Rep. No. 595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. Embracing this objective, the Supreme Court has likewise explained that “the policy of Chapter 11 is to permit successful rehabilitation of debtors.” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) (quoting the legislative history).

As the Supreme Court has further recognized, “Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate.” *Toibb v. Radloff*, 501 U.S. 157, 163 (1991); *see also Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999) (recognizing the reorganization policy of “maximizing property available to satisfy creditors”). As similarly explained by the Fifth Circuit: “A principal goal of the reorganization provisions of the Bankruptcy Code is to benefit the creditors of the chapter 11 debtor by preserving going-concern values and thereby enhancing the amounts recovered by all creditors.” *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 373 (5<sup>th</sup> Cir. 1987) (*en banc*), *aff’d*, 484 U.S. 365 (1988); *see also* G. Eric Brunstad, Jr., *Bankruptcy*

*and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 Bus. Law. 499, 528-29, 565-66 (2000) (discussing the purposes of chapter 11 and explaining how individual debt collection activity may destroy the value of a financially troubled enterprise and reduce recoveries to creditors).<sup>12</sup>

In this instance, NextWave stands poised to fulfill Congress's statutory objectives. Specifically, NextWave is prepared to consummate its chapter 11 plan, which would permit NextWave to retain its assets, pay its creditors in full (including the FCC), produce a return for its investors, provide employment for its workers, permit the continued construction and operation of its network, and emerge from bankruptcy as a viable, reorganized enterprise. The FCC, however, wants none of this, and contends that NextWave is without the ability to reorganize on the theory that the FCC is free to cancel NextWave's licenses and dispose of them as the FCC chooses. The FCC's theory, however, contravenes applicable federal law and its purported cancellation of NextWave's licenses must be set aside.

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<sup>12</sup>Significantly, the reorganization policies of facilitating rehabilitation and maximizing the creditors' return are longstanding fixtures of bankruptcy law. For example, section 77B of the former Bankruptcy Act of 1898, 11 U.S.C. § 205 (1934) (repealed 1938), which permitted corporate reorganizations, was premised on the same considerations. See *Case v. Los Angeles Lumber Prods. Co., Ltd.*, 308 U.S. 106, 124 (1939) (stating that "[o]ne of the purposes of section 77B was to avoid the consequences to debtors and creditors of foreclosures, liquidations, and forced sales with their drastic deflationary effects").

Under the Bankruptcy Code, NextWave's licenses enjoy a narrow but critical statutory protection which the FCC has plainly ignored. Although the Bankruptcy Code leaves unaffected much of the FCC's regulatory powers, the one clear limitation that the Code imposes is that a governmental agency may not, by regulation or otherwise, revoke a license on the ground that a bankrupt debtor has not made a payment to the particular agency during the course of its bankruptcy case. This limited intrusion on the powers of the FCC is one that Congress has deemed necessary to ensure the orderly administration of bankruptcy cases, and it follows the principle that, during the course of the debtor's case, all payments are suspended pending an appropriate disposition of the debtor's assets and liabilities. In this instance, the FCC is not free to ignore the command of the Bankruptcy Code any more than it is free to ignore the requirements of other federal statutes directed at its conduct.

In addition, enforcement of the provisions of the Bankruptcy Code in this case is essential to prevent a gross injustice. In this instance, the stark reality is that the FCC has placed its institutional interests above those of NextWave's other creditors, investors, and lenders in violation of the fundamental bankruptcy principle of equality of distribution under the law. *See Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (observing the "prime bankruptcy policy of equality of distribution among creditors of the debtor");

*Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) (observing that “historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt’s assets”); *see also SEC v. Brennan*, 230 F.3d 65, 71-72 (2d Cir. 2000) (stating that, after fixing the amount of a debt, “the government necessarily acts only to vindicate its own interest in collecting its judgment”). Had the FCC not blocked confirmation of NextWave’s chapter 11 plan by announcing its surprise cancellation of NextWave’s licenses, NextWave would have emerged from bankruptcy, paid the FCC and all other creditors in full, and put the spectrum covered by its licenses to immediate use. Conversely, if the FCC is permitted to proceed with the cancellation and resale of NextWave’s licenses, the FCC will be the only party to receive satisfaction of its claim, and, further, may receive a windfall in the form of its retention of NextWave’s approximately \$500 million downpayment. Worse, the FCC will succeed in accomplishing its illicit objectives notwithstanding its persistent representations in the bankruptcy court and elsewhere that NextWave would enjoy the full protections of the chapter 11 process, including the representation that its licenses would not cancel while NextWave attempted to reorganize. The FCC is not free to lull NextWave and its creditors into believing that the FCC will respect the law, and then turn around and violate that very same law for its own institutional advantage.

**A. The FCC's Purported Cancellation of NextWave's Licenses Violates the Requirements and Restrictions of the Automatic Stay and Is Therefore Void.**

By operation of law, when a debtor files for relief under chapter 11 of the Bankruptcy Code, a bankruptcy estate is formed consisting of all of the debtor's interest in property of every kind, including a license or any interest in a license. See 11 U.S.C. § 541(a).<sup>13/</sup> In this instance, at the time NextWave filed for bankruptcy relief, its licenses constituted NextWave's property for bankruptcy purposes, and thus became property of its bankruptcy estate. See *Ramsay v. Dowden (In re Central Arkansas Broad. Co.)*, 68 F.3d 213, 214-15 (8<sup>th</sup> Cir. 1995) (concluding that "the bankruptcy court correctly determined the [FCC] license was property of the estate"); *In re Tak Communications, Inc.*, 985 F.2d 916, 918 (7<sup>th</sup> Cir. 1993) (same); *Shiner v. Fugazy (In re Fugazy Express, Inc.)*, 124 B.R. 426, 430 (S.D.N.Y. 1991) (holding that an FCC license is property of the estate), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992); *In re Kansas Personal Communication Servs., Ltd.*, 252 B.R. 179, 184-85 (Bankr. D. Kan. 2000) (FCC licenses for C-Block personal communications services spectrum held to be property of the debtor's bankruptcy estate); see also 28 U.S.C. § 1334(e) (vesting exclusive jurisdiction in the bankruptcy court over property of the estate); *FCC v. GWI PCS 1 Inc. (In re GWI PSC 1 Inc.)*, 230

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<sup>13/</sup>Section 541(a) provides in relevant part: "[t]he commencement of a case . . . creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held: . . . all legal or equitable interests of the debtor in property." 11 U.S.C. § 541(a).

F.3d 788, 803 n.29 (5<sup>th</sup> Cir. 2000) (“[t]he bankruptcy court’s enjoining the FCC from revoking the licenses and avoiding the majority of the obligations under the notes was within its jurisdiction to preserve property of the estate, see 11 U.S.C. § 541, and further the reorganization plan”).

In addition, by operation of law, the commencement of a bankruptcy case also triggers the provisions of the automatic stay, which prevent creditors from engaging in debt collection activity, acting against the debtor’s property, or otherwise dismembering the estate during the course of the proceedings. See 11 U.S.C. § 362(a). As the legislative history to section 362(a) makes plain, the scope of the stay is broad, and includes efforts by governmental creditors to revoke any license: “All proceedings are stayed, including . . . license revocation.” H.R. Rep. No. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6297; see also *In re Kansas Personal Communication Servs., Ltd.*, 252 B.R. at 189-90 (holding that the FCC’s cancellation of licenses was stayed by section 362). As explained further in the legislative history:

The automatic stay [of section 362(a)] is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops *all collection efforts*, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97 (emphasis added); see also *Midlantic Nat’l Bank v. New Jersey Dep’t*

*of Env'tl. Protection*, 474 U.S. 494, 503 (1986) (quoting legislative history); *Pintlar Corp. v. Fidelity & Cas. Co. (In re Pintlar Corp.)*, 124 F.3d 1310, 1313 (9<sup>th</sup> Cir. 1997) (discussing purpose of the automatic stay); *Checkers Drive-In Restaurants, Inc. v. Commissioner of Patents & Trademarks*, 51 F.3d 1078, 1082 (D.C. Cir. 1995) (stating that the automatic stay “must be construed broadly”); *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1203-04 (3d Cir. 1992) (discussing purpose of the automatic stay). As the legislative history further explains, the automatic stay likewise operates to safeguard the bankruptcy policy of equality of distribution under the law:

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of [their] claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure [or reorganization procedure, as the case may be] under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297; *see also Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755-56 (9<sup>th</sup> Cir. 1995) (stating that the automatic stay “assures creditors that the debtor's other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor's assets”).

Quite clearly, the FCC's conduct in this case cannot be squared with the text and purpose of the automatic stay. In this instance, the FCC has sought to cancel and reauction NextWave's licenses exclusively to further its

own interests, regardless of the effect on other parties. The automatic stay, however, proscribes precisely this kind of self-interested behavior because it detracts from the Bankruptcy Code's goals of facilitating reorganization, maximizing the value of the debtor's assets for the sake of all concerned, and promoting the fair treatment of all parties in interest. Accordingly, because the FCC's conduct in this case is contrary to the provisions and purpose of the automatic stay, it is invalid as a matter of law. *See Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9<sup>th</sup> Cir. 1992) (actions taken in violation of the stay are void).

It is true, of course, that section 362(b)(4) exempts from the scope of the automatic stay the exercise of certain governmental police and regulatory powers. *See* 11 U.S.C. § 362(b)(4). But as courts have recognized, the scope of section 362(b)(4) is limited, and does not apply to the government's enforcement of pecuniary claims that alter control over, or effect a disposition of, property of the debtor's estate. *See SEC v. Brennan*, 230 F.3d 65, 71-72 (2d Cir. 2000) ("anything beyond the mere entry of a money judgment against a debtor is prohibited by the automatic stay") (citing cases); *Cash Currency Exchange, Inc. v. Shine (In re Cash Currency Exchange, Inc.)*, 762 F.2d 542, 555 (7th Cir. 1985) (observing that section 362(b)(4) "has been narrowly construed to apply to the enforcement of state laws affecting health, welfare, morals and safety, but not to 'regulatory laws that directly conflict with control of the *res* or property by the bankruptcy court.'"); *In re Kansas*

*Personal Communication Servs., Ltd.*, 252 B.R. at 191-92 (holding that the FCC's cancellation of C-Block licenses because of missed payments served to protect its pecuniary interest, and was therefore not exempted under section 362(b)(4)).<sup>14</sup> Indeed, by its own terms, section 362(b) does not extend to the enforcement of "money judgments," and the provision cannot extend to the enforcement of pecuniary obligations of the kind at issue here without destroying the essential purpose of the automatic stay, which is precisely to *prevent* the dismemberment of the debtor simply to enhance a particular creditor's financial interest at the expense of other creditors who are no less deserving of recovery.<sup>15</sup>

At bottom, section 362(b)(4) carves out from the general scope of the automatic stay a governmental agency's general police and regulatory

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<sup>14</sup>As explained in the legislative history to section 362(b)(4): "This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." 124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *see also* 124 Cong. Rec. S17,409 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).

<sup>15</sup>In 1998, Congress amended section 362(b)(4) by consolidating former subsections (b)(4) and (b)(5) into a single subsection, and adding a specific reference to exercise of the police or regulatory power pursuant to the Chemical Weapons Convention. There is no evidence that Congress intended thereby to expand the exemption to permit governmental agencies to pursue or act on their pecuniary claims against the estate or its property. Indeed, as explained in the legislative history, "the new [section 362(b)(4)] relates only to the enforcement of police and regulatory power—a term which cannot appropriately be given an expansive construction for purposes of interpreting

authority, but leaves intact the prohibition against the enforcement of pecuniary debts. For example, a bankrupt debtor cannot hide behind the automatic stay and continue to contaminate the environment free from government interference. At the same time, a governmental agency is not free to enforce an assessment of pre-bankruptcy clean-up reimbursement costs because doing so conflicts with the Bankruptcy Code's carefully crafted scheme for the disposition of a debtor's property. See *Ohio v. Kovacs*, 469 U.S. 274, 283 n.11 (1985) (observing that "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter"); *SEC v. Brennan*, 230 F.3d at 72-73 (distinguishing the exercise of the police and regulatory power from the enforcement of a pecuniary claim). Although the distinction between a governmental agency acting as a "regulator" and a governmental agency acting as a "creditor" may be difficult to define with precision in some instances, under any analysis the FCC has crossed that line in this case.

Here, the sole basis for the FCC's revocation of NextWave's licenses is the FCC's contention that NextWave did not make an interest payment during the course of its bankruptcy case. The FCC contends that its enforcement of NextWave's pecuniary obligation is "regulatory" because the enforcement serves a regulatory purpose, and therefore lies within the ambit

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the new Bankruptcy Code language." 143 Cong. Rec. H10,951 (daily ed. Nov.

of section 362(b)(4). This argument goes too far. Governmental collection activities are always in some sense “regulatory” in nature because they always serve at least some regulatory purpose. Moreover, under the FCC’s theory, every governmental agency should always be at liberty to proceed in bankruptcy to collect virtually any kind of monetary indebtedness regardless of the effect on the estate. Not only would this violate the specific language and policies of the Bankruptcy Code, it is also contrary to established case law.

For example, under the FCC’s theory, the IRS might plausibly justify its seizure of a debtor’s property to compel the payment of a tax obligation on the basis that it is simply performing a “regulatory” purpose (e.g., enforcing the tax laws to enhance the public fisc). As the Supreme Court has concluded, however, the IRS enjoys no such immunity from the Code’s restrictions. See *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (enforcing the Bankruptcy Code against the IRS to prevent the seizure of property and concluding that “[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exemption for the tax collector”); *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 134 (2d Cir. 1992) (stating that “it is well established that other federal agencies, such as the Internal Revenue Service (“IRS”), are required to obtain

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12, 1997) (remarks of Rep. Gilman).

[from the bankruptcy court] relief from the automatic stay before they can enforce prepetition debts”).

In this case, the FCC occupies no better ground than any other governmental agency attempting to collect a debt. Just as the automatic stay prevents federal agencies from pursuing debt collection activities of the kind at issue here, it likewise prevents the FCC from revoking NextWave’s licenses because NextWave did not make an interest payment during the course of the case.

In addition, the FCC’s efforts to shelter its conduct within the ambit of “regulatory” decision making, and hence beyond the scope of the automatic stay, is also fundamentally inconsistent with the agency’s numerous and repeated assurances to NextWave and its creditors during the course of the bankruptcy case. During the case, the FCC repeatedly stated that, although section 362(b)(4) left unfettered much of the agency’s regulatory authority, the statute nevertheless prevented the agency from collecting its approximately \$5 billion claim or revoking NextWave’s licenses on the ground that the debt remained unpaid.<sup>167</sup> Having assured NextWave and its

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<sup>167</sup> For example, in 1998 the FCC explained:

The bankruptcy code also excepts from its automatic stay provisions ‘the commencement or continuation of an action or proceeding by a governmental unit’s police or regulatory power.’ 11 U.S.C. § 362(b)(4). Under this provision, however, an agency’s enforcement of final regulatory order against a bankrupt is subject to the automatic stay, and the bankrupt retains its right to challenge any such order in the appropriate

creditors that the agency would be bound by the automatic stay in its treatment of NextWave's licenses, the FCC cannot now contend fairly that it possesses immunity from the statute's salutary prohibitions.

**B. The FCC's Purported Cancellation of NextWave's Licenses Is Proscribed by Section 525(a) of the Bankruptcy Code.**

In addition, and wholly apart from the limitations imposed by the automatic stay, the FCC's conduct likewise violates the unambiguous provisions of section 525(a). In unequivocal terms, section 525(a) commands that "a governmental unit may not . . . revoke . . . a license . . . solely because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a).<sup>177</sup> In the chapter 11 context, a debt is

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forum. See Board of Governors of the Federal Reserve Sys. v. MCorp Financial, Inc., 502 U.S. 32, 41, 44-45, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991). Thus, . . . NextWave will still enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs. See NLRB v. 15<sup>th</sup> Avenue Iron Works, Inc. 964 F.2d 1336, 1337 (2d Cir. 1992).

(Memorandum of Law in Support of FCC's Motion for Mandatory Withdrawal of the Bankruptcy Court Reference and Dismissal of NextWave's Adversary Proceeding, at 18 n.5). Similarly, the FCC stated: "The motion that is being made by the Federal Communications Commission is not by any means to bar this debtor from getting relief in bankruptcy. During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold creditors at bay, including the Federal Communications Commission." (Transcript of Proceedings before the District Court, Hon. Barrington D. Parker, Jr., Nov. 9, 1998, at 5).

<sup>177</sup>The provisions of section 525(a) stem from the Supreme Court's decision in *Perez v. Campbell*, 402 U.S. 637 (1971). See S. Rep. No. 95-989, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867. In *Perez*, the Court

dischargeable as provided in section 1141(d), which specifically encompasses “any debt that arose before the date [of the confirmation of the debtor’s plan].” 11 U.S.C. § 1141(d) (emphasis added).<sup>187</sup> In this instance, NextWave proposes in its plan to discharge its debt to the FCC by paying the same in full. Because the FCC’s efforts to revoke NextWave’s licenses flies in the face of section 525(a), its efforts are invalid under applicable law and must be set aside. See *Walker v. Wilde (In re Walker)*, 927 F.2d 1138, 1142-43 (10<sup>th</sup> Cir. 1991) (statutory revocation of real estate license for failure to satisfy dischargeable debt found to be unenforceable as a violation of section 525); *Smith v. Pennsylvania Dep’t of Transp.*, 66 B.R. 244 (E.D. Pa. 1986) (threat to revoke license for failure to pay fine held to be violation of section 525(a)).

**C. The FCC’s Purported Cancellation of NextWave’s Licenses Contravenes NextWave’s Statutory Right to Propose and Confirm a Plan that Permits NextWave to Cure any Default, Retain its Licenses, and Satisfy Its Debt to the FCC.**

Further, the Bankruptcy Code also authorizes a chapter 11 debtor to propose a plan of reorganization that permits it to retain its assets, pay its

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ruled that an Arizona Motor Vehicle Safety statute violated the Supremacy Clause of the Constitution. Specifically, the statute in question provided that a revoked driver’s license could not be reinstated absent the payment of certain accident related judgements—even if those judgments had been discharged in bankruptcy. Observing that an important purpose of bankruptcy is to provide a “fresh start” to debtors, the Court held that the Arizona statute was in conflict with the purpose of the bankruptcy laws and thus violated the Supremacy Clause of the Constitution. See *Perez*, 402 U.S. at 648, 656.

creditors, and emerge from bankruptcy as a viable enterprise. See 11 U.S.C. §§ 1121(a), 1123(a)(5)(A), 1123(a)(5)(G), & 1141. Toward this end, section 1123(a)(5)(G) specifically authorizes the debtor to cure any payment default asserted by the FCC. As several courts have recognized, a debtor's right to cure a default under the Code has the effect of nullifying completely the consequences of the default. See *Florida Partners Corp. v. Southeast Co. (In re Southeast Co.)*, 868 F.2d 335, 337-38 (9<sup>th</sup> Cir. 1989); *Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply, Inc.)*, 850 F.2d 1338, 1342 (9<sup>th</sup> Cir. 1988) (stating that "[i]t is clear that the power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default"); *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982) (stating that "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified"); *In re Kansas Personal Communication Servs., Ltd.*, 252 B.R. 179, 195 (Bankr. D. Kan. 2000) (determining that chapter 11 debtor could cure default in payment obligations to FCC); see also *Brattleboro Hous. Auth. v. Stoltz (In re Stoltz)*, 197 F.3d 625, 629-31 (2d Cir. 1999) (affirming the debtor's right to cure a default under a lease against a governmental agency); S. Rep. No. 95-989, at 120 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5906 (recognizing that the

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<sup>18</sup>As section 106(a) of the Bankruptcy Code makes plain, the provisions of section 1141 apply to governmental units. See 11 U.S.C. § 106(a).

right to cure is an “important reorganization technique”). Because NextWave has elected to cure its payment default to the FCC, the FCC lacks the ability to revoke NextWave’s licenses as though the default were somehow still a valid ground for the revocation.

The invalidity of the FCC’s efforts to revoke and reactivate NextWave’s licenses is further underscored by reference to the bankruptcy rule that, after filing for bankruptcy relief, a debtor is generally prohibited from making payments of the kind at issue in this matter other than pursuant to a confirmed plan. As the Fourth Circuit has explained:

The clear language of [chapter 11], as well as the Bankruptcy Rules applicable thereto, does not authorize the payment in part or in full, or the advance of monies to or for the benefit of . . . claimants prior to the approval of the plan of reorganization.

*Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4<sup>th</sup> Cir. 1987); *see also In re Revere Copper & Brass, Inc.*, 32 B.R. 577, 582 (Bankr. S.D.N.Y. 1983) (stating that “[p]repetition creditors may be paid or recover on their claims in a Chapter 11 case only by means of a distribution under a confirmed plan of reorganization”).<sup>19/</sup> Because the Bankruptcy Code

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<sup>19/</sup>An exception to the “no interim payment” rule applies to certain kinds of payments to secured parties to the extent necessary to provide “adequate protection.” *See* 11 U.S.C. § 363(e); *see also* 11 U.S.C. § 361 (defining the concept of “adequate protection”). Payments of this kind, however, require a motion and court authorization. In this case, wholly apart from the fact that the FCC was never entitled to “adequate protection,” the FCC never filed a motion seeking payment of the interest payment in question, and certainly never obtained court authorization for it. On the contrary, the FCC assured NextWave and its creditors that the company

affirmatively prevents payments of the type asserted by the FCC as the reason for revoking NextWave's licenses, it would be anomalous to conclude that the mere fact that NextWave did not pay the FCC during the course of its case may serve as the basis for NextWave's forfeiture of its most critical assets. *See In re NextWave Personal Communications Inc.*, 244 B.R. 253, 264 (Bankr. S.D.N.Y. 2000).

NextWave complied with applicable law by filing its plan of reorganization specifying how and when it would repay all of its debts. The FCC cannot now contend successfully that NextWave should instead have violated the law by making payments to the FCC outside the plan process. Similarly, the FCC cannot now contend successfully that NextWave should be penalized with the loss of its licenses for its compliance with the very same law. Again, the *only* reason for the FCC's cancellation of NextWave's licenses is that NextWave did not make an interest payment to the FCC during the course of the bankruptcy case. Because this payment would have been contrary to law, the FCC's insistence on the forfeiture of NextWave's licenses is the epitome of arbitrary agency action.

**D. Enforcement of the Bankruptcy Code in this Case Is Essential To Ensure the Successful Operation of Congress's Carefully Crafted Bankruptcy Scheme, and To Prevent a Governmental Agency from Exempting Itself from the Statutory Requirements of the Bankruptcy Code in Violation of Congress's Determination that no such Exemption Exists.**

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would be protected while it reorganized. Hence, the adequate protection exception is irrelevant.

As the foregoing demonstrates, sections 362(a), 525(a), 1123(a), and 1141(d) compel the conclusion that the FCC is prohibited by law from revoking and reauctioning NextWave's licenses for the reason that NextWave's did not make an interest payment during the course of its bankruptcy case. But wholly apart from the clear command of these statutory provisions, scrupulous adherence to their requirements is all the more important because the failure to do so invites chaos in the administration of bankruptcy cases generally.

The bankruptcy system functions on the strength of the bankruptcy court's ability to marshal the debtor's assets and prevent creditors, including governmental agencies, from engaging in individual debt collection activities that diminish the debtor's value or prevent the orderly administration of the debtor's affairs. See G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 53 Bus. Law. 499, 528-29, 565-66 (2000). If the FCC has immunity from the Bankruptcy Code in this case, then virtually every other federal or state agency can and will claim the same immunity in the enforcement of a pecuniary obligation. Because governmental agencies appear frequently as creditors in bankruptcy cases, immunizing the FCC from the Code's requirements sets a precedent that is destined to render chaotic the administration of bankruptcy cases as a whole.

No general rule of law grants any federal agency immunity from the requirements of the Bankruptcy Code, and no specific rule of law exempts the FCC from the Code's requirements in this instance. On the contrary, section 106 of the Code expressly waives the government's sovereign immunity, and expressly provides for the application of the Code's provisions to governmental agencies such as the FCC. See 11 U.S.C. § 106(a) (waiving sovereign immunity with respect to "governmental units"), § 101(27) (defining the term "governmental unit" to include federal agencies); *FCC v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, 230 F.3d 788, 803 n.29 (5<sup>th</sup> Cir. 2000) (concluding that "11 U.S.C. § 106 renders the United States and the FCC subject to the bankruptcy proceedings").<sup>20f</sup>

Moreover, on previous occasions, the FCC has attempted and failed to obtain from Congress the immunity that it asserts here.<sup>20g</sup> In rejecting the

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<sup>20f</sup>Congress has expressly exempted certain persons from various obligations under the Bankruptcy Code. See 11 U.S.C. § 525(a) (enumerating certain exemptions). Congress's specific enumeration of these exemptions without mentioning the FCC, however, only cements the conclusion that there is no exemption for the FCC in this case. See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947 (2000) ("a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity"); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (Congress's enumeration of specific exceptions to statutory scheme precluded inference of an exemption for federal agencies).

<sup>20g</sup>Most recently, the House held hearings on the FCC's request for a statutory exemption from the automatic stay, and decisively rejected the request. In a letter dated May 12, 2000, the relevant committee submitted its findings to the Speaker of the House:

FCC's overtures, Congress has recognized repeatedly that there is no compelling reason to accommodate the FCC's ambitions. Given that Congress has declined to grant the FCC's request for immunity, the FCC cannot now contend successfully that it is entitled to exempt itself from the

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The Commercial and Administrative Law Subcommittee's April 11 hearing examined the FCC's contention that it is exempt from the automatic stay provision under section 362(b) of the Bankruptcy Code. Every member of the subcommittee present at the hearing expressed his concern or disagreement with the FCC's position that it is exempt from the automatic stay provision – a position contrary to congressional intent when it enacted section 362(b) in 1997. . . . [The FCC's proposals] conflict with one of the Bankruptcy Code's fundamental tenets that all similarly situated creditors be treated equally absent significant public policy reasons warranting some form of preferred treatment (e.g., police and regulatory enforcement officials, spousal and child support claimants, victims of fraud). These proposals, however, would endow the FCC with more protections than virtually any other creditor, including the Internal Revenue Service, has under the current bankruptcy law. They would exempt the FCC from the Bankruptcy Code's automatic stay provision, a provision to which the FCC is subject. If enacted, this proposed legislation could potentially destroy a debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment. . . . Notwithstanding the extraordinary ramifications of these FCC proposals, no compelling public policy has been articulated justifying such radical legislative relief. . . . We oppose inclusion of such proposed legislation or any similar provision giving the FCC an exemption from the automatic stay provision by amending section 362(b), which does not exempt the FCC despite its claim to the contrary.

(Letter dated May 12, 2000 from Chairman Henry Hyde and Congressmen John Conyers, Jr., George Gekas, and Jerrold Nadler) (a copy of the letter is included as Addendum 7 to NextWave's opening brief).

statutory limitations that the Bankruptcy Code imposes unambiguously on *all* governmental agencies that are not specifically exempted.

The issues in this case strike at the very core of the administration of cases under the Code. The ability of any creditor to ignore the Code's salutary provisions and act on its own initiative jeopardizes Congress's carefully balanced scheme for the rehabilitation of bankrupt debtors. Indeed, as the legislative history to sections 362(a) and 525(a) reveals, reorganization is simply not possible if creditors, including governmental agencies, remain free to plunder a debtor's assets simply because their claims remain unpaid. In this instance, the FCC is not free to ignore the Code's commands, and its purported cancellation of NextWave's licenses should be set aside.

**II. Enforcement of the Bankruptcy Code in this Case Is Essential To Ensure that the Interests of NextWave's Innocent Creditors and Investors Are Taken into Account.**

In its single-minded effort to cancel and reauction NextWave's licenses in violation of the Bankruptcy Code (and likewise contrary to its own repeated assertions that the licenses could not be cancelled), the FCC has ignored completely the interests of NextWave's innocent creditors and investors, as well as the consequences to these parties of the FCC's precipitous conduct. As this Court and the FCC have acknowledged, however, the FCC has an obligation to take these interests and effects into account. See *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974); *In re Application of Second Thursday Corp.*, 22 F.C.C.2d 515, 516 (1970). In

*LaRose*, this Court held that the FCC's refusal to consider the merits of a proposed sale of a bankrupt licensee's broadcast license offered by a court-appointed receiver constituted an abuse of discretion because the refusal operated to deprive creditors of any significant recovery of the monies that they had advanced to the debtor, thereby frustrating the public interest. Specifically, the Court stated: "Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest." *LaRose*, 494 F.2d at 1146, n.2.

In this case, one of the very purposes of chapter 11 of the Bankruptcy Code is to compel the resolution of NextWave's business and financial affairs in a manner designed to maximize the interests of all concerned, not simply the FCC. Under *LaRose*, the FCC is not free to ignore this salutary federal policy. Because the FCC has failed completely to take into account the interests of NextWave's other creditors and investors, and likewise account for the draconian consequences of its purported revocation of NextWave's licenses, the FCC's cancellation of the licenses should be set aside.

**III. Conclusion**

For the foregoing reasons, the undersigned respectfully request that the Court set aside the FCC's purported cancellation of NextWave's licenses and grant NextWave such further and additional relief as the Court may deem just.

Respectfully submitted.

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**CERTIFICATE OF LENGTH**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7), that the foregoing brief is 8,677 words (excluding items enumerated in subsection 32(a)(7)(B)(iii)), as measured by Microsoft Word 97, a word processing system that includes footnotes and citations in word counts.

\_\_\_\_\_  
Mark W. Deveno

December 18, 2000.

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing brief, together with the addendum attached thereto, as well as the accompanying motion for leave to participate as amicus curiae were served on this 18<sup>th</sup> day of December, 2000, via Federal Express on each of the following:

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ADDENDUM

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11 U.S.C. § 362

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

...

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

\* \* \*

11 U.S.C. § 525

**§ 525. Protection against discriminatory treatment.**

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with

respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

\* \* \*

11 U.S.C. § 541

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553 or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire with 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C 2751 et seq.), or any accreditation status or State licensure of the debtor as an education institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A) (I) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B) (I) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (I) only by virtue of section 542 of this title;

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

(c) (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the state under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the

servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

\* \* \*

11 U.S.C. § 1123

§ 1123. Contents of plan.

(a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall—

...

(5) provide adequate means for the plan's implementation, such as

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

\* \* \*

## 11 U.S.C. § 1141

**§ 1141. Effect of confirmation.**

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsection (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title;

or

(iii) the holder of such claims has accepted the plan;

and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

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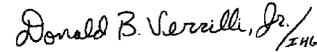
Bob Barr, Chairman  
Subcommittee on Commercial and Administrative Law  
Congress of the United States  
House of Representatives  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6216

Dear Chairman Barr:

Pursuant to your letter dated December 20, 2001, I provide the following response to Representative Graham's question:

Barbour, Griffith & Rogers does not represent NextWave, and I therefore have no personal knowledge of its compensation agreement. It is my understanding that Barbour, Griffith & Rogers represents Bay Harbour Management, a shareholder in NextWave. In February 2002, the National Journal reported that Bay Harbour has paid Barbour, Griffith & Rogers \$1.3 million since 1999 to represent its interests in Washington, DC. I have informed Doug Teitelbaum, a principal of Bay Harbour, of the Committee's interest in securing information concerning the fee arrangement between Bay Harbour and Barbour, Griffith & Rogers.

Sincerely,

  
Donald B. Verrilli, Jr.

